The Law Commission

Consultation Paper No. 131

Assisting and Encouraging Crime

A Consultation Paper

HMSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 27 July 1993, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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Consultation Paper No. 131

Assisting and Encouraging Crime

A Consultation Paper

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THE LAW COMMISSION

ASSISTING AND ENCOURAGING CRIME

A CONSULTATION PAPER

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ABBREVIATIONS

In this Paper we use the following abbreviations:

PWP No 43: Law Commission Published Working Paper No 43, *Liability for Acts of Another* (1972)

WP No 50: Law Commission Working Paper No 50, *Inchoate Offences: Conspiracy, Attempt and Incitement* (1973)

Code Report: Law Commission Report Law Com No 177 (1989): *A Criminal Code for England and Wales*.

Draft Code: the draft Bill contained in volume 1 of the Code Report.

Ashworth: Professor Andrew Ashworth, *Principles of Criminal Law* (1991)

Smith & Hogan: Sir John Smith and Professor Brian Hogan, *Criminal Law* (7th edition, 1992).

KJM Smith: Professor KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991).

Spencer: JR Spencer, *Trying to help another person to commit a crime*, in *Essays in Honour of JC Smith* (ed. Smith, 1987).

In discussing cases the letters P and D may be used to refer, respectively, to the person committing the principal crime and to the accessory or inciter.

INTRODUCTION TO THE PAPERS

This Consultation Paper is concerned with Assisting and Encouraging Crime: that is, with the extent to which persons who do not themselves commit a specific offence should be subject to sanctions for assisting and encouraging others to commit such an offence. The present law on these topics is complicated and uncertain; and the policy questions that they raise are both important and difficult.

In order to give a complete account of those matters, this Consultation Paper has necessarily to be of considerable length and detail. Many readers will wish to look critically at the whole of the Paper. However, those who are already fully familiar with the present law, or do not wish to pursue its full intricacies, may consider that they can safely devote the majority of their attention to Part III of the Paper (which lists the main issues needing consideration from the point of view of law reform) and Part IV (which sets out and discusses our provisional proposals for such reform). To assist such readers, both Part III and Part IV refer back where necessary to the discussion of the present law in Part II.

In addition, the Commission publishes, simultaneously with this Consultation Paper, a shorter Overview paper that summarises the main issues and the way in which we suggest they should be addressed. Readers of the Consultation Paper may find it helpful to read, or at least to look at, the Overview before embarking on the Consultation Paper itself.

PART I

THE SUBJECT AND ITS LIMITS

The problem

1.1 Assisting and Encouraging Crime is almost entirely a matter of common law. It displays to a marked degree what is often the characteristic of an area of criminal law governed by the common law, that clear rules, and agreed statements of principle, are conspicuously lacking from it. This Paper therefore has to investigate, in some considerable detail, the content of the present law, before considering how that law might be reformed.

1.2 The subject, and the issues that it raises, is complex and difficult because it involves not merely the creation of forbidden results by a defendant's own acts (which is the case with the law relating to specific offences); but the association of the defendant, in some way, with offences committed by others. It is therefore necessary to consider a range of analytical issues, specific to this part of the criminal law, such as the description and limitation of the concepts of assistance and encouragement; the relationship between the mental state of the assister, D, and the acts and intentions of the person, P, who commits the specific crime; and the extent to which D should intend, or be aware of, the results of the acts of another person, P. That means that it is not possible simply to refer to and rely on general principles of the criminal law: concepts must be developed for use in these special cases where D's culpability rests not on the commission of a specific crime by himself but on his association with a crime committed by another, and this is what we have set out to do in this Paper.

1.3 This two-fold aspect of assisting and encouraging crime, that D's culpability arises in relation to other criminally culpable acts committed by P, not only causes special problems of analysis, but also raises very important issues of policy. The extent to which, and the terms on which, D should be liable for association with someone else's criminality obviously gives rise to a tension between, on the one hand, a desire to discourage acts that support or reinforce crime; and, on the other hand, fears that the criminal law might operate in an excessive and unreasonable way unless limits are put on its ability to impose criminal sanctions on people who do not, themselves, commit the crime of which P is accused. All of these questions are, again, specific to this subject, and have to be worked out in detail if effective proposals are to be made for introducing rational principles into this part of the criminal law.

1.4 After reviewing this range of analytical and policy issues, which have only rarely been addressed in detail in previous consideration of the subject, we have been driven to the conclusion that the law is unlikely to be put on a proper basis unless a new structure of statutory offences is adopted in place of the present haphazard growth of the common law. These new offences, and the limitations that should be placed on them, have again to be expounded at some length, and criticism invited of them.

1.5 The structure of this Consultation Paper is therefore as follows. In the remainder of this Part I we give a very brief account of the areas of the present law which are covered by the Paper, and we explain the limits of the present study. In Part II we attempt to set out,

in as much detail as is necessary, the present rules governing those areas of law. In Part III we draw together the criticisms that have been made of that law, and the respects in which it does not serve the purpose for which it is intended. In Part IV we propose a new approach to the problems we have identified, and set out in detail, for critical comment, a new scheme of law to address those problems. Part V is a summary of the issues on which we specifically invite the comments and criticisms of readers. In an Appendix we give an account of the law in other major jurisdictions.

Previous consideration of the subject

1.6 There is no generally agreed single title that covers the whole of the law dealt with in this paper. We will on occasion use titles such as "complicity", "accessoryship" and "secondary liability" simply as a means of general description and reference. As we explain further below, we have sought to bring within our study all parts of the law that fall under that broad category of conduct, with a view to seeing whether it is possible to produce a single simplified and rationalised set of rules, applying throughout the criminal law. That has required the consideration of some parts of the law that have previously been only marginally treated, or have not been treated at all, as aspects of what is traditionally thought of as the law of facilitation or of aiding and abetting.

1.7 Even as recently as 1978 the author of a leading work that reviewed criminal law and criminal law theory throughout the English-speaking world felt obliged to point to what he regarded as an extraordinary lack of interest in those jurisdictions in the law of complicity. Referring to the literature, the author could point to only two articles of note, and very sparse text-book treatment, and he commented: "Would that the field were better charted"![1] As part of its work on the eventual codification of the criminal law, the Law Commission had in 1972 published a Working Paper on *Parties, Complicity and Liability for the Acts of Another.*[2] That Working Paper was, however, limited to the law on parties to offences, and disappointment was expressed that the Commission had not taken a more radical approach to the difficulties and technicalities that were even then seen by some to beset the law of complicity.[3] Shortly thereafter, in June 1973, the Commission published its Working Paper No 50[4] that dealt, inter alia, with incitement. Although that paper recognised the substantial overlap between facts that found a charge of "incitement" and facts that found a charge of "aiding and abetting",[5] and suggested that some of the problems of the law of incitement could be solved by adoption of rules which had been developed under the categorisation of

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[1] Fletcher, *Rethinking Criminal Law* (1978), p. 637, n.4.

[2] Published Working Paper No. 43, June 1972 (hereafter, "PWP No 43"). For contemporary comments on the paper see [1972] Crim LR 764; [1973] Crim LR 223.

[3] Cross and Jones, *Introduction to Criminal Law* (8th edition, 1976), paragraph 19.23.

[4] *Inchoate Offences: Conspiracy, Attempt and Incitement*, Working Paper No. 50 (hereafter, "WP No 50").

[5] "It is difficult, however, if not impossible, to draw any real distinction between the degree of persuasion required for incitement as an inchoate offence and the persuasion which may be present in many instances of abetting": Working Paper No. 50, para. 96.

aiding and abetting,[6] there was no investigation of whether these two similar parts of the law should be treated rationally as a whole.

1.8 The two working papers just referred to were not followed by a report dealing with either aiding and abetting or incitement. Accordingly when the Commission in 1989 published its draft *Criminal Code* it was constrained to set out the existing common law on each of these topics, treating them as entirely separate parts of the Code structure.[7] In taking that course the Commission recognised that the traditional structure of the law had been subjected to searching criticism, but indicated that the radical reconsideration and consultation necessary in a review of that structure could not be undertaken within the boundaries of that Code exercise.[8] The Commission had also recognised the difficulties caused by some aspects of the present law of aiding and abetting when surveying the law on conspiracy to defraud, and in its working paper on that subject[9] invited comment on whether that part of the law should be further investigated.

1.9 That comment was broadly supportive of the desirability of investigating the matter further, and that, allied to the difficulties uncovered in the course of the Code exercise, fortified us in our decision to undertake the present study. That decision was reinforced by other considerations. First, at least two important cases had revealed that the present law was or might be incapable of coping, at least without very severe distortion, with certain pressing moral and social problems in respect of which it seemed particularly important that the criminal law should adopt a clear and rational position.[10] Second, detailed discussion of

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[6] E.g., the element of provocation or persuasion required in incitement (WP No 50, para. 96); whether a victim of a crime can be liable for inciting the commission of that crime (WP No 50, para. 100); and whether it is possible to be guilty of inciting someone to commit a crime when the person incited escapes principal liability only because of the availability of a personal defence such as infancy or mental defect (WP No 50, para. 102).

[7] Law Com No 177, *A Criminal Code for England and Wales*, paragraphs 9.17-9.42 and 13.4-13.19, and Code Bill clauses 27 and 47. Following the nomenclature adopted in our recent Consultation Paper No. 122, we will hereafter refer to Law Com. No. 177 as the "Code Report", and to the draft Bill contained in Law Com No 177 as the "Draft Code".

[8] *Ibid.*, at para. 9.4.

[9] Working Paper No.104, *Conspiracy to Defraud* (1987), Appendix C.

[10] These two cases, discussed in more detail in the body of this paper, were *Cogan and Leak* [1976] QB 217 and *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112. The different problems posed by the two cases neatly illustrate the conflicting tensions that shape the law of accessory liability. *Cogan and Leak* concerned clearly anti-social conduct, the encouragement by a husband of third parties to have intercourse with his wife by telling them that she enjoyed the experience when in fact she did not consent, which conduct could however only with very great difficulty be brought within any part of the law of accessory or other liability. *Gillick* concerned a situation of difficult, even agonising, social and moral dilemma: whether and on what terms a doctor should provide contraceptive advice to a girl under the age of sixteen. It is clearly of importance, and concern, that leading authorities are not able to state with certainty whether or not a doctor who provided such advice on a principled and morally responsible basis would be liable, under what is currently believed to be the law of accessory liability, for aiding and abetting an offence of having intercourse with a girl aged less than 16 under section 6 of the Sexual Offences Act 1956: see e.g. Professor JC Smith [1986] Crim LR 114-117.

these and other cases has revealed that there is substantial uncertainty even as to what might be thought such central issues as the definition of the *mens rea* required to convict of complicity.[11] Third, the regrettable growth in terrorist offences, and in organised crime generally, has reinforced the need for a clear and effective, but at the same time rationally limited, law to control those who organise and support criminal activity without directly committing the crimes themselves.[12] Fourth, the lack of clarity in the present law of assisting and encouraging crime has caused uncertainty and dispute about the proper ambit of related areas of the law that deal with similar conduct, such as the law of conspiracy[13] and "joint enterprise".[14] And, finally, these developments, and the stimulus provided by the Commission's restatement of the law in the Draft Code,[15] have given rise to a substantial amount of very well-informed public discussion that has more than supplied the want identified by Professor Fletcher,[16] even if the overall effect of that discussion has been more to identify problems in the present law than to propose generally agreed solutions.[17]

1.10 As we have indicated, amongst other considerations that recent developments in the courts have pressed on us has been the realisation that more parts of the present criminal law need to be included in the present study than merely the traditional law of "aiding and abetting". In the next section of this Introduction we therefore indicate, necessarily in brief and summary form, the parts of the traditional structure of the criminal law with which this Consultation Paper deals. This account is offered to enable the reader to get his bearings at

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[11] See e.g. Professor Ian Dennis in *Essays in Honour of JC Smith* (ed. Smith, 1986), at pp.40ff., [1988] Crim LR 649 and [1989] Crim LR 168; GR Sullivan, [1988] Crim LR 641 and [1989] Crim LR 166; Professor Glanville Williams [1990] Crim LR 4 and 98; Professor R A Duff [1990] LS 165. These studies have added to the already very lengthy treatment of the mens rea of complicity in the standard work on criminal law: Smith and Hogan, *Criminal Law* (7th edition) [hereafter, *Smith & Hogan*], pp. 138-150.

[12] See e.g. *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350.

[13] See in particular *Anderson* [1986] AC 27; *Hollinshead* [1985] AC 975.

[14] See e.g. *Chan Wing-Siu* [1985] AC 168, and generally paragraphs 2.108-2.125 below.

[15] See n. 7 above.

[16] See n. 1 above.

[17] In addition to the work already cited we may mention: J C Smith, *Aid, Abet, Counsel, or Procure* in *Reshaping the Criminal Law* (ed. Glazebrook, 1978), and *Secondary Participation and Inchoate Offences* in *Crime, Proof and Punishment* (ed. Tapper, 1981); S Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* (1985) 73 Cal LR 324; J R Spencer, *Trying to help another person to commit a crime* in *Essays in Honour of JC Smith* (ed. Smith, 1987); Ashworth, *The Draft Code, Complicity and the Inchoate Offences* [1986] Crim LR 303; Alldridge, *The Doctrine of Innocent Agency* (1990) 2 *Criminal Law Forum* 45; no less than five articles by Professor Glanville Williams pointing to substantial problems revealed by the Draft Code's treatment of complicity: [1990] Crim LR 781, [1990] New LJ 921, [1990] 10 LS 245, (1990) 53 MLR 445 and [1991] Crim LR 416; and above all the monograph by Professor KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991). Some indication of the scope of the present problem is given by the fact that Professor Smith's study, that covers a substantial part but not the whole of the ground traversed by this Consultation Paper, occupies some 260 pages. Professor Smith was good enough to supply us with an advance manuscript copy of his work, and we have benefitted very greatly from his detailed review.

an early stage of the paper; it is not intended as a substitute for, or even as a summary of, the detailed exposition and discussion in the body of the Paper.

Main areas of law addressed in this paper

Aiding and abetting

1.11 This, the central part of the law relating to assisting or encouraging crime, is also referred to as the law of complicity, accessoryship or (more colloquially, and perhaps less happily) facilitation. "Aiding and abetting" is not in law a separate *offence*, but only a means of committing the offence abetted. Therefore, as all treatments of the subject take for granted, a person can only be an accessory to a crime that has actually been committed,[18] and the law of accessoryship or aiding and abetting has traditionally been regarded as part of the law of parties to offences: "a person may be guilty of an offence either as a 'principal' or as an 'accessory'".[19] A person is guilty of an offence as an accessory if, with *mens rea* the exact nature of which is a matter of some controversy,[20] he "procures, assists or encourages"[21] the commission of that offence by the principal.

Incitement

1.12 Incitement is not part of the law of parties to offences but part of the law of inchoate offences, and thus is traditionally treated quite separately from accessoryship.[22] That is despite the fact that incitement consists, as in part does aiding and abetting, of encouraging[23] another to commit an offence. The effect of this distinction is that someone who incites another to commit a crime, for instance, murder, is guilty of a separate offence of incitement to murder, and not, as he would be if charged as an aider and abettor, of committing murder itself, albeit as an accessory and not as a principal. The distinction is not entirely technical, because it means that a person who incites another to commit a crime can still be charged and convicted of incitement even if the principal crime is not committed; but he cannot be convicted of aiding and abetting that crime, any more than can an accessory who *assists* towards a principal crime that in the event is not committed.

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[18] *Smith and Hogan*, pp. 123-148; Code Report, paragraphs 9.5-9.42; Draft Code, clause 27. The principle is deeply embedded in all common law systems. Thus, "It is hornbook law that a defendant charged with aiding and abetting the commission of crime by another cannot be convicted in the absence of proof that the crime was actually committed": *US v Ruffin* 613 F 2d 408, 412 (2d Cir, 1979).

[19] Code Report, paragraph 9.5.

[20] See n. 11 above; the issue is reviewed in paragraphs 2.47-2.79 below.

[21] Draft Code, clause 27(1)(a).

[22] *Smith & Hogan*, pp. 265-269; Code Report, paras 13.4-13.19; Draft Code, clause 47.

[23] We adopt this formulation here in order to indicate the *broad* similarity between the conduct that suffices for incitement and conduct that suffices for accessoryship. It is possible, though not wholly clear, that a conviction for incitement requires conduct somewhat more positive than mere encouragement: for a full discussion see paragraph 2.132 below.

Joint enterprise

1.13 This doctrine has only been subjected to close analysis in comparatively recent times,[24] though its point of origin is to be found in the early case of *Macklin*:[25]

> "It is a principle of law that if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law, done by all."

Thus stated, the doctrine fixes D with liability in respect of a crime committed by P because of D's having agreed to participate in some of P's more general activities. It has become, in its modern form, a means of imposing liability on D where D and P embark on what can be characterised as a (criminal) "joint enterprise", and in the course of that enterprise a "collateral" crime is committed by P: the case most usually cited is where P commits a murder in the course of a joint burglary by himself and D. Such cases should cause difficulty, in terms of a desire to inculpate D with the murder as opposed to the burglary, only where there is doubt as to D's *accessory* liability for the murder because that latter crime was "a possibly unwelcome incident of the [enterprise]."[26]

1.14 It might therefore be thought that cases where joint enterprise has formed the basis of liability must necessarily be governed by different rules from those of accessory liability; and that was indeed the view taken in the leading case of *Chan Wing-Siu*,[27] where the Privy Council emphasised that liability of a secondary party for "acts by the primary offender of a type which the former foresees but does not necessarily intend" rested on a "wider principle" than that of accessory liability. Nevertheless, writers of authority discuss the doctrine of joint enterprise as part and parcel of the law of accessory liability,[28] and we ourselves indeed felt able to regard the law as stated in *Chan Wing-Siu* as coming within the definition of accessory liability put forward in the Draft Code.[29] There is therefore a substantial degree of uncertainty in relation to the exact status of joint enterprise liability. This and the question whether the fact of participation in such an enterprise does, and should, create liability different from, and more extensive than, that imposed under the law of accessoryship, clearly need to be addressed in the course of the present exercise.

Liability for the acts of an innocent agent

1.15 The definition of the "actus reus" of many crimes leaves open the possibility that the principal offender can fall within that definition even though some part, or even all, of the

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[24] See KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991) [hereafter, *KJM Smith*], chapter 8.

[25] (1838) 2 Lew CC 225, per Alderson B.

[26] *Hyde, Sussex and Collins* [1990] 3 WLR 1115 at 1119A.

[27] [1985] AC 168 at 175F-G.

[28] *Smith & Hogan* pp. 143-146.

[29] See Code Report, paragraph 9.28, and Professor JC Smith in [1989] Crim LR pp. 903-904.

forbidden conduct was performed not by him personally, but by another acting as his agent: causing death in homicide, and destroying or falsifying accounts in false accounting,[30] are but two possible examples. Often, such cases will be treated as simply ones of personal liability on the part of the principal, without there being thought to be any special doctrinal issues involved, and with there being no question of liability on the part of the agent: for instance, where a postman delivers a letter bomb, or a prospectus making a false representation, in ignorance of its contents. There is, however, a more difficult category of case where the agent is not "innocent", in the sense of not knowing the true nature of what he has been asked to do, but nonetheless cannot for reasons of *law* be himself liable for performing those acts. A simple example of such a case is the sending of a child under ten years of age to remove property belonging to another without their consent: thus creating the factual reality of, and the social misconduct represented by, theft on the part of the child, who is however exempted from criminal responsibility solely on the ground of his age.

1.16 In the latter type of case, it is clearly desirable to submit the principal to criminal sanctions. He cannot be liable as an accessory, because his agent, the person who has actually committed the actus reus, has committed no crime.[31] There has therefore been developed a doctrine, known as that of "innocent agency", which in effect recognises and rationalises the fact that a person may be liable as a principal, and not as an accessory, when the agent whom he uses for his criminal purposes commits no crime: whether that agent's innocence be through lack of knowledge of the facts, or because of a legal exemption.[32]

1.17 Since this is a matter of principal liability, it might appear not to need consideration as part of the present exercise. However, the use of the doctrine of innocent agency is not straightforward when the prime mover has used an innocent agent to achieve a result that breaches a criminal provision that appears to be defined in terms that require *personal* conduct on the offender's part. A clear, though we may hope unusual, example, is the case of *Cogan and Leak*,[33] where D persuaded P to have intercourse with D's wife by falsely telling P that Mrs D consented: D thereby, it was alleged, himself committing "rape" on Mrs D. It is clearly desirable that persons engaging in such behaviour should be convicted of something. However, to deal with them as principals presents the difficulty of convincingly attributing the principal conduct, in the immediate case sexual intercourse, to D, who merely stood by. On the other hand, liability for accessory conduct, which might seem the most natural analysis of what D did, is precluded by the doctrine that there can be no accessory liability for a crime that is not committed: for instance, since on the facts of *Cogan and Leak*, P's belief in Mrs D's consent exempted him from principal liability for rape. In the Draft

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[30] Theft Act 1968, section 17 (1) (a).

[31] See paragraph 1.11, n. 18 above.

[32] *Smith & Hogan*, pp. 124-125. "A person acts through an innocent agent when he intentionally causes the external elements of the offence to be committed by (or partly by) a person who is himself innocent of the offence charged by reason of lack of a required fault element, or lack of capacity": PWP No 43, proposition 3, cited by the Court of Appeal (Criminal Division) in *Stringer* (1991), 94 Cr App R 13 at p. 16.

[33] [1976] QB 217.

Code[34] we proposed a solution for such cases based on principal, rather than accessory, liability. We recognised, however, that that solution might not necessarily reflect existing law,[35] and was in the nature of a response to the particular demands of codification. Other commentators have by contrast seen the solution of such problems as lying in an extension of the orthodox rules of aiding and abetting to make the abetting or counselling of a mere actus reus, rather than of a completed crime, an indictable offence.[36]

1.18 This particular problem, and its implications for the more general law of innocent agency, cannot therefore be resolved without careful consideration of the law of accessory liability. Here again, therefore, the present exercise would not be complete without a review of these policy and analytical issues, that we found troublesome and difficult[37] when formulating the Draft Code.

Other related areas of law

1.19 There are a number of other areas of law that have sometimes been discussed together with, or been thought to be related to, accessory liability, which we do not address in detail in this Consultation Paper. In the following paragraphs we briefly refer to these areas of law, and explain why they are not addressed in the present law reform exercise.

Conspiracy to commit a crime

1.20 Under Part I of the Criminal Law Act 1977 it is an offence for two or more persons to conspire, that is to say agree together, that a crime should be committed.[38] Conduct amounting to such agreement may well also fulfil the requirements for assisting or encouraging crime, in that one conspirator may be seen as encouraging the other actually to commit the crime: for instance, where D incites or encourages P to rob a bank, and does so successfully to the extent that P agrees to follow the course of action recommended, D and P have undoubtedly committed the crime of conspiracy.[39] Although doubt has sometimes been expressed as to the need for an offence of conspiracy to commit a crime, the policy of the 1977 Act, adopting a conclusion reached in the Law Commission's report on conspiracy

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[34] Clause 26(1)(c). See also paragraphs 9.10-9.14 of the Code Report.

[35] See the Code Report, paragraph 9.9. Some of the difficulties posed by this solution are explained in *Smith & Hogan*, p. 125.

[36] *Smith & Hogan*, p. 153; Cross, Jones & Card, *Introduction to Criminal Law* (11th edition, 1988), p. 596.

[37] Code Report, paragraphs 9.10 and 9.11.

[38] *Smith & Hogan*, pp. 269-272; Draft Code, clause 48.

[39] This observation does not extend to another, and even more controversial, species of conspiracy, conspiracy to defraud, since the latter does not, or at least does not necessarily, involve agreement on the commission of a *crime*, and thus in such cases cannot overlap with the law as to assisting and encouraging crime. For conspiracy to defraud, see generally Law Commission Working Paper No. 104, *Conspiracy to Defraud* (1987).

in 1976,[40] is that the offence serves a useful and necessary purpose. The effect of that conclusion is that there is likely to be some overlap in their practical application between the law of conspiracy and the law of complicity.

1.21 In this Consultation Paper we do not seek to disturb that conclusion, nor to investigate possible amendments of the law of conspiracy. At the same time, however, we remain conscious of the potential width of the crime of conspiracy, and of concerns that that crime should not be used unnecessarily. Some critics[41] have argued that the present defects in the law of complicity, and in particular the unreasonably restricted ambit of the law of aiding and abetting, have led the courts improperly to extend the crime of conspiracy in order to convict what are, in reality if not in the present law, abettors. It might indeed also be argued that, even where the rules as to conspiracy are properly applied, it is preferable for the misconduct of those who assist or encourage others to commit crimes to be controlled by offences specifically directed at that category of conduct, rather than for those assisters or encouragers to be wrapped together with the intended principal offender in a more generally defined crime of conspiracy.

1.22 In considering the desirability of possible reforms of the present law of aiding and abetting we will, therefore, have in mind the practical effect of such reforms in relation to the law of conspiracy: and in particular whether that crime has had to be used to control antisocial behaviour because of weaknesses in the law of complicity.

Possession offences

1.23 There have been many occasions on which Parliament has intervened *ad hoc* to penalise the possession of specific types of property. These have usually been objects intended, or suitable, for use in the commission of specific crimes;[42] such provisions can thus be seen as a prophylactic measure in advance of the event, not only against the commission of crime, but also against the encouragement of such crime by the supply of material for its commission. This approach has also, more controversially, been extended outside the area of specific objects defined by Parliament to convict parties of conspiracy to defraud who agreed to put into circulation "dishonest devices the sole purpose of which was to cause loss":[43] in that particular case, "black boxes", the sole function of which was to interfere with electricity meters and thus secure an improperly reduced charge for the use of current.

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[40] Law Com. No. 76, *Conspiracy and Criminal Law Reform*, at paragraph 1.5.

[41] In particular JR Spencer in *Essays in Honour of JC Smith* (ed. Smith, 1987) [hereinafter *Spencer*], at pp. 154-156.

[42] E.g. "flick-knives" (Restriction of Offensive Weapons Act 1959, section 1); material for use in the course of burglary or theft (Theft Act 1968, section 25); material for use in counterfeiting (Forgery and Counterfeiting Act 1981, section 17).

[43] *Hollinshead* [1985] AC 975 at p. 997E. See generally Law Commission Working Paper No. 104, at paragraphs 10.28-10.36.

1.24 We consider the *Hollinshead* problem in assessing the impact of our proposals on the future use of the law of conspiracy to defraud. Although the accused in that case no doubt planned, or at least were not unwilling, to encourage crimes by others, by the supply to the latter of devices that could only be used to commit the crime of dishonestly abstracting electricity,[44] they could not be shown, by actually supplying boxes to people who then used them, to have committed an offence under the present law of complicity. That might appear a defect in the law as to such offences: particularly when it was thought necessary and appropriate to rectify the position by use of the wide and controversial offence of conspiracy to defraud.[45] Apart from this however, we do not in the present study review the present range or nature of possession offences. Such offences are essentially designed for a specific purpose, and to operate with less direct reference to the commission of particular offences than is appropriate for a general law of complicity.

Vicarious liability[46]

1.25 This doctrine, if doctrine it can be called,[47] involves the imposition on the defendant of criminal liability for physical acts committed by another person, but it really has no connection with the law of complicity, and it raises issues quite different from those involved in the law of complicity.[48] The law of vicarious liability applies only to offences created by statute, and has been well described as "a necessary doctrine for the enforcement of modern legislation".[49] That objective is achieved by two methods. First, statutory provisions imposing *strict* liability for certain activities may be interpreted as meaning that a master for instance "sells" goods even though all the physical acts involved in that operation are performed by one of his employees.[50] That is in effect no more than the imposition of principal liability for the physical acts of an agent, such as we mentioned in paragraph 1.15 above. Its importance in the present context is, however, that since a conviction of a strict liability offence can be obtained without proof of mens rea, the employer's personal ignorance of what is being done does not prevent his conviction being based, and simply being based, on the physical actus reus that has been attributed to him. Secondly, and more

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[44] Theft Act 1968, section 13.

[45] See n. 43 above.

[46] *Smith & Hogan*, pp. 170-178.

[47] Pace, [1982] Crim LR 627.

[48] "Other than both using the behaviour of one party as a basis for holding another party criminally responsible, vicarious and complicity liability are diverse and distinct doctrines": *KJM Smith*, p. 8. The Commission's Working Party included the law of vicarious liability in the same study as complicity in PWP No 43 in 1972, to which reference is made in paragraph 1.7, n. 2, above; but the two topics were there considered entirely separately, and there has never been any suggestion that they should be treated as a single subject or, even, that the rules of one might cross-fertilise the rules applying to the other.

[49] Per Lord Goddard CJ in *Gardner* v. *Ackroyd* [1952] 2 QB 743 at p. 751.

[50] *Smith & Hogan*, pp. 175-176.

controversially,[51] a person may be held liable for the acts of another where he has "delegated" to that other the performance of certain duties placed on him by an Act of Parliament: for instance, a duty imposed by local police legislation on cafe proprietors not knowingly to permit prostitutes to congregate on their premises.[52]

1.26 The essence of both these techniques is that they take no account of, and do not require there to be established, any criminality, actual or prospective, on the part of the employee or delegate. The accused's liability is therefore not, and is indeed nothing like, one of complicity or accessoryship. While, therefore, as our predecessors thought,[53] the law of vicarious liability may well need some further study and revision, that study is not necessary in order to ensure a coherent and complete survey of the law of aiding and assisting crime, and it is therefore not pursued further in this exercise.

Accessories after the fact

1.27 Accessories after the fact are those who, in traditional parlance, "knowing a felony to have been committed by another, receive, relieve, comfort or assist the felon."[54] As such, their conduct forms part of the law of interference with the processes of justice and not part of the law of complicity, and any connection with the latter is, in modern times, to be found only in the similarity of title of the two offences. That has now been recognised in the Criminal Law Act 1967, section 4 of which replaces the old law of accessory after the fact with a new offence of assisting the principal after he has committed an arrestable offence.

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[51] Aspects of the law are criticised in PWP No. 43, at p. 31, and in *Smith & Hogan* at pp. 172-175. The delegation principle itself was questioned, obiter, in several of the speeches in the House of Lords in *Vane v Yiannopoulos* [1965] AC 486.

[52] *Allen v Whitehead* [1930] 1 KB 211.

[53] See n. 51 above.

[54] *Russell on Crime* (12th edition, 1964), i 163.

PART II

THE PRESENT LAW

INTRODUCTION

2.1 In this Part of the Paper we give an account of the present law. In so doing we have sought to concentrate on those aspects of the law that are most in doubt, or most in need of consideration from the point of view of law reform. As a result, although we trust that this account gives a full and fair statement of the law, it does not seek to rival, in detail of treatment, either the monograph by Professor KJM Smith or the exemplary text-book treatment by Smith & Hogan. Readers will wish to have recourse to those two works if they require fuller authority on any point.

2.2 We should give one preliminary warning. In our analysis we have followed the standard works in dividing consideration of complicity liability in the same manner as consideration of substantive crimes, between the physical acts for which the accused can be liable, in traditional parlance the actus reus; and the mental state or mens rea that must be established to secure a conviction. This approach has the merit of facilitating the organisation of what is, in analytical terms, a complex and underdeveloped body of law. However, there are many aspects of the law of, in particular, aiding and abetting that do not fit easily or exclusively into either of these analytical categories. Thus, issues such as the extent to which an act which consists of the performance of a legal duty can ground accessory liability (see paragraphs 2.31-2.34 below); or the extent to which "procurement" forms a separate head of such liability (see paragraphs 2.14-2.15, 2.19 and 4.192-4.197 below); give rise to questions both of "actus reus" and of "mens rea". We have therefore not found it possible, any more than have other students of the subject, to impose a completely clear-cut analytical scheme on the material that follows.

AIDING AND ABETTING

The Physical Element in Aiding and Abetting

Principals and accessories distinguished

2.3 A person who acts as a principal cannot, fairly obviously, be an accomplice; and a party does not become an "accomplice" in general terms, but an accomplice or accessory to a specific crime committed by a specific principal offender. It is therefore necessary, in order to discuss any given case of actual or alleged accessory liability, to identify the principal offender or perpetrator.[55]

2.4 Normally that will cause no difficulty, it being clear as a matter of commonsense rather than sophisticated analysis who is the principal offender and who, if anyone, is an accessory. If a definition of principal activity is required, that provided by Smith and Hogan

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[55] The principal does not have to be identified by *name*, so long as it is clear that the principal offence has been committed by *someone*: *Anthony* [1965] 2 QB 189, cited at n. 131 to paragraph 2.36 below.

is that the principal is the person whose behaviour is the most immediate cause of the actus reus.[56] For instance, in murder, the man who with the necessary mens rea fires the gun, thus causing the death; or, in theft, the man who "appropriates" the thing that is stolen. There are, however, one or two special cases where, in the present context, some care is required in stating the reasons for characterising behaviour as that of a principal rather than as that of an accessory.

2.5 First, as we discussed in paragraph 1.15 above, the actus reus of a crime is, according to the particular definition of the crime in question, the conduct or the result, that the definition of the crime forbids. The principal may cause a result not directly by an "act" of his own, such as the firing of the gun in the example given in the last paragraph, but indirectly through the acts of others. Some such agents may be purely ignorant, mechanical instruments of the conscious principal, such as a company's accounts staff acting on the dishonest instructions of the accused to make payments that are not in fact due, such payments being an appropriation of the company's property;[57] or the agents may be not so much ignorant as protected from personal liability by a special rule of law, such as the child whose parent sends him to steal. While such cases of "innocent agency" can, usually, be properly presented as cases of *principal* liability on the part of the prime mover of the dishonest conduct, care must be taken to ensure that what the principal is alleged to have done does indeed fall within the terms of the offence with which he is charged. Thus, for instance, where the offence prohibits a form of conduct, such as "driving" a defective vehicle, it is simply not the case that D, who encouraged permitted or even ordered P to get behind the wheel of such a vehicle, has himself performed the conduct that the offence forbids. In such cases, D's liability, if any, must be that of an accessory and not of a principal.[58]

2.6 Second, it is of course possible to have more than one perpetrator of the same crime. That may occur either where the actus reus is made up of two or more distinct elements, which are separately satisfied by two or more persons acting jointly; or where, in a given case, an actus reus consisting of a single element is satisfied by joint activity by two or more persons. An example of the former is where, during a robbery,[59] D1 holds a gun to the victim's head whilst D2 grabs his property.[60] A straightforward example of the latter is where D1 and D2 attack a third person and the combined effect of their blows is to kill him.[61] The appropriate test in all such cases would seem to be that suggested by Smith and Hogan, namely whether D2 by his own act (as distinct from anything done by D1 with D2's

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[56] *Smith & Hogan*, p. 124.

[57] E.g. *Stringer* (1992) 94 Cr App R 13.

[58] See the discussion of *Thornton v Mitchell* [1940] 1 All ER 339 in paragraph 2.35 below.

[59] Committed when "a person....steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person...": Theft Act 1968, section 8(1).

[60] Code Report, Appendix B, example 26(1), illustrating clause 26(1)(b) of the Draft Code.

[61] *Macklin and Murphy* (1838) 2 Lew CC 225.

advice or assistance) contributed to the causation of the actus reus.[62] One needs to remember, however, that where that causation is alleged to have taken place through the medium of an innocent agent, it must indeed be possible properly to say that D1 has done that which the definition of the crime forbids.

Accessories: historical background

2.7 The common law of felonies designated the actual perpetrator of the offence as "the principal in the first degree". Secondary parties were divided into "principals in the second degree" (anyone, at the scene of the crime, giving encouragement or assistance) and "accessories before the fact" (those who participated at an earlier time).[63] Those giving assistance to a felon after the commission of the offence were designated "accessories after the fact".[64] By contrast, the common law did not create different categories for different modes of participation in misdemeanours or treasons; all participants in these offences were treated as principals.[65] However, these distinctions did not lead to differences between the conduct that founded accessory liability in the case of treason on the one hand or misdemeanour on the other hand: as Professor KJM Smith summarises his detailed review of the historical position, "Despite these important procedural contrasts with the position of felonies, the substantive law in relation to the physical and mental ingredients of 'secondary liability' in all offences (subject to individual modifications) was similar."[66]

2.8 Because of the different status of the different parties to a felony, specific provision was, however, required to ensure that accessories, whether before or after the fact, could be indicted, tried and punished as if they were principal felons. There was of course no rational reason for there to be a distinction in those respects between principals in the second degree and, at least, accessories before the fact. However, in the statutory provisions which set out these arrangements, it appears to have been thought prudent to add that, equally, those guilty of secondary conduct in relation to misdemeanour could be dealt with as if they were principals, even though, strictly speaking, they were in law not notional but actual

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[62] *Smith & Hogan*, p. 126.

[63] The designation of those who encourage or assist at the scene of the crime as principals in the second degree is described in *KJM Smith*, p. 23, as a judicial device to escape the "administrative quagmire" caused by the rule that an accomplice could not be brought to trial until conviction and sentence of death had been attained for the principal offender.

[64] See paragraph 1.27 above.

[65] Separate levels of liability were not recognised for these types of offences since treasons were regarded as too serious, and misdemeanours not serious enough, to justify distinction between parties: *KJM Smith*, p. 20, citing Stephen, HCL ii, 234.

[66] *KJM Smith*, at p. 21. "The rule is, that in misdemeanours all persons concerned therein are principals...and whatever would make a person accessory in a felony makes him a principal in crimes where there are no accessories": *Russell on Crimes and Misdemeanours* (3rd edition, 1843), vol. I, p. 82, note (b) by C.S. Greaves.

principals.[67] These arrangements were brought together in the Accessories and Abettors Act 1861, sections 1-7 of which dealt with the indictment, trial and punishment of accessories, either before or after the fact, and section 8 of which provided that

> "Whosoever shall aid, abet, counsel or procure the commission of any misdemeanour...shall be liable to be tried, indicted, and punished as a principal offender."

2.9 In their seventh report, *Felonies and Misdemeanours*, in 1965, the Criminal Law Revision Committee pointed out that the distinctions drawn between principals and accessories in respect of felonies were merely technical matters relating to the form of the indictment and, in the course of recommending the abolition of the distinction between felonies and misdemeanours, suggested that in such procedural matters all indictable offences should be governed by the law relating to misdemeanours.[68] These recommendations were effected by the Criminal Law Act 1967, which repealed the whole of the 1861 Act apart from section 8, which now applies to all indictable offences.[69]

Conduct constituting aiding and abetting

2.10 Before 1975 the received view was that the particular words used in section 8 to describe accessoryship had no special implications, and certainly were not to be taken in their literal or natural meaning as coercing any particular conclusion as to the type of conduct that amounts in law to complicity.[70] That conduct was thought to be of two broad types: that which has the potential to encourage or influence the perpetrator; and that which assists or helps the perpetrator carry out the offence. The use of the different terms in section 8 of the 1861 Act was, broadly speaking, seen for what it is, a declaration of the common law[71] contained in a statute that simply dealt with procedural matters.[72] However, in *A-G's Reference (No. 1 of 1975)* the Court of Appeal, per Lord Widgery CJ, said:

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[67] See paragraph 2.7, n. 65 above. An example of such treatment is to be found in 7 & 8 Geo. 4, c. 30, s. 26 (making provision in respect of damage to property).

[68] CLRC, 7th Report, paragraph 24.

[69] Similar provision is made in respect of summary offences by section 44 of the Magistrates' Courts Act 1980.

[70] "Nothing is to be gained by attempting to distinguish between the meanings of different words used in this connection": Sir Francis Adams, *Criminal Law and Practice in New Zealand* (1971), p. 186, cited by JC Smith in *Reshaping the Criminal Law* (ed. Glazebrook, 1978), p.125; see also *KJM Smith*, pp.30-31. An illustration of the pre-1975 assumptions is provided by the fact that in the 74 pages devoted to accessory liability in Glanville Williams' magisterial work *Criminal Law: the General Part* (2nd edition, 1960) there is only one brief footnote reference to section 8, on a matter of pleading, and the terms of the section are not quoted.

[71] So held e.g. per Lord Goddard CJ in *Carter Patersons and Pickfords v Wessel* [1947] 1 KB 849 at p. 852, and by Lord Alverstone CJ in *Du Cros v Lambourne* [1907] 1 KB 40 at p. 44. See also the Court of Appeal (Criminal Division) in *Hollinshead* [1985] AC 975 at p. 985.

[72] See paragraphs 2.8-2.9 above.

"We approach s. 8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if four words are employed here 'aid, abet, counsel or procure', the probability is that there is a difference between each of those four words and the other three, because, if there were no such difference, then Parliament would be wasting time in using four words where two or three would do".[73]

2.11 The requirement in *A-G's Reference (No. 1)* that the words used in section 8 of the 1861 Act should be treated as a literal indication of the factual content of the law of complicity causes manifold difficulties, some of which we instance in the following paragraphs.

2.12 The injunction to give the four words their ordinary meaning is in any event difficult to obey, since at least the word "abet" can hardly be said to be in ordinary usage; nor have attempts to elucidate any distinctly *legal* meaning of the words been much more successful. Thus, it has been suggested in the House of Lords (contrary to the assumption in *AG's Reference (No.1)* that each word has a separate and discrete meaning) that "aid and abet" is a single concept, "aid" denoting the actus reus and "abet" the mens rea of the prohibited activity.[74] It is, however, difficult or impossible to lay hands on authority for that analysis, nor is it clear to what legal results the analysis would lead. This view that "aid and abet" alludes to the physical and the mental elements of a single concept also causes severe difficulty when one combines the approach through "natural meaning" with the root idea, which never seems to have been challenged, that the behaviour that can found a charge of accessoryship can take one of two different, though perhaps overlapping, forms: encouragement, and assistance.[75] The difficulty is that the natural meaning of "aid" is to give help or assistance, but "abet" has the distinctly different meaning of "incite, instigate or encourage".[76] Moreover, as so defined, "abet" seems indistinguishable from the ordinary meaning of "counsel".

2.13 It has been suggested that an important difference between the various words in section 8 may be that aiding and abetting imply presence; so that a person charged as aider and abettor is not guilty if his part in the commission of the crime was not played while present at the commission of the offence.[77] If interpreted strictly, such a rule could be extremely restrictive, but it is submitted that this echo of the old law as to felonies does not continue to rule us from the latter's grave. Under the modern law, governed by the rules previously

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[73] [1975] QB 773, at p. 775.

[74] *Lynch v DPP for Northern Ireland* [1975] AC 653, at p. 681.

[75] See paragraph 2.10 above.

[76] Shorter Oxford English Dictionary (3rd ed., reprinted with corrections, 1964), p. 3.

[77] *Bowker* v. *Premier Drug Co. Ltd.* [1928] 1 K.B. 217.

applying to *misdemeanours*,[78] any act amounting to aiding and abetting while present would amount to counselling or procuring while absent, and vice versa.[79]

2.14 The foregoing discussion does not touch on whether "procurement" forms a separate category of aiding and abetting. That issue raises two particular problems. First, such cases of accessory liability as have been identified as ones of procurement have involved conduct on the part of the accessory that it would be possible, but artificial, to describe as assistance of the principal offender.[80] Second, it is difficult to discuss the possible "actus reus" of procurement in isolation from the question of the mental element on the part of the accessory required to establish a case of procurement, since "to procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening;"[81] "in modern English usage I think 'procure' is understood as importing the notion of intention or at least willing acceptance of a contemplated result".[82] These definitions suggest, therefore, that procurement consists of conduct of some sort in relation to the commission of an offence, but with a particular mental attitude in respect of whether that offence should in fact be committed. For that reason, it is necessary to reserve full discussion of whether, in the present law, "procurement" is a discrete category of aiding and abetting until we discuss the mental element which is required for aiding and abetting.[83] Procurement does, however, need separate consideration in respect of the issue, which is perhaps of greater theoretical than of practical importance, of whether there has to be a causal link between accessory conduct and the commission of the principal crime.

The role of causation

2.15 In *A-G's Reference (No 1 of 1975)* the Court of Appeal held that "you cannot procure an offence unless there is a causal link between what you do and the commission of an offence."[84] In that case, where the "accomplice" D had added alcohol to the perpetrator P's drink, D was guilty of procuring the (strict liability) offence of driving with excess alcohol if he knew that P was going to drive and also that the natural result of "lacing" the drink would be to put P over the limit. The offence "has been procured because, unknown to the

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78 See paragraph 2.9, n. 68, above.

79 JC Smith, *op. cit.* in n. 70 above, at p. 127.

80 See paragraph 2.19 below.

81 Per Lord Widgery CJ in *A-G's Reference (No 1 of 1975)* [1975] QB 773 at p. 779F.

82 Bingham LJ in *Blakely v DPP* [1991] RTR 405 at p.417E.

83 See paragraphs 2.47-2.79 and 4.192-4.196 below.

84 [1975] QB at p. 780B.

driver and without his collaboration, he has been put in a position in which in fact he has committed an offence which he never would have committed otherwise".[85]

2.16 In contrast, "abet" and "counsel" do not require such a causal connection since these words "do not even imply that the offence has been committed".[86] Thus, although it is the law that the offence must actually have been committed before an abettor or counsellor can be liable,[87] there does need to be a "but for" causative link between, for example, the counselling and the commission of the offence. Thus in *Calhaem*,[88] D was charged with counselling Z to kill another, having paid him £5,000 to do so. Z gave evidence for the prosecution that he had decided not to kill the victim but had gone to the victim's address intending to act out a charade so as to keep the appellant happy: however, the victim's reaction had made him go berserk and kill her. D claimed that she could not be guilty as an accomplice unless there was a substantial causal connection between her acts and the commission of the offence. The court held that the ordinary meaning of the word "counsel" did not imply a causal connection, it being sufficient if the crime was committed "within the scope of the authority or advice".[89] It would appear that "aid" likewise does not imply a causal link, since there are many reported cases where it is arguable that the perpetrator would have gone on to commit the offence whether assisted or not.[90]

2.17 These latter cases appear to be consistent with the conclusions of theoretical studies of the role of causation in accessory liability. Of these, the most important is that of Professor Sanford Kadish, who considers that, by definition, complicity liability cannot rest on notions of causation:

> "Causation applies where results of a person's actions happen in the physical world. Complicity applies where results take the form of another person's voluntary action. Complicity emerges as a separate ground of liability because causation doctrine cannot satisfactorily deal with results that take the form of another's voluntary action."[91]

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[85] *Ibid.* The court's description of procurement cited in paragraphs 2.14-2.15 above makes it clear that not *merely* causation, but also endeavour on the part of the principal, is required for liability. We mention this point only because it has been the subject of some academic controversy: see *Smith & Hogan*, pp. 129-130.

[86] *Smith & Hogan*, p. 127.

[87] See n. 18, paragraph 1.11 above.

[88] [1985] QB 808.

[89] *Ibid.*, at p. 813. The Court gave the following unusual example as a case where the counsellor would not be liable: the perpetrator is involved in a football riot in the course of which he assaults and kills a man who, unknown to him, is the same person he had been counselled to kill.

[90] For example, the facts of *Lomas* (1913) 9 Cr App R 220.

[91] (1985) 73 Cal LR at p. 327.

2.18 This view has been strongly supported by other writers, notably Dr Glanville Williams.[92] A cautionary note is, however, sounded by Professor KJM Smith, who points to the absence from the case-law of any properly articulated theory of the nature of the connection between the accessory's conduct and the principal offence.[93] We are bound to agree that that is correct. However, a principal's liability depends, in most crimes, on his subjective state of mind towards the consequences of his own acts, and the principal's willed human action is therefore interposed between the conduct of the accessory and the completion of the principal crime on which the accessory's liability depends. In such cases it is not in fact possible to assert a causal relationship, in the legal sense of causation, between the accessory's actions and the commission of the principal's crime.[94] Where by contrast the principal's liability does not depend on the existence of any subjective state of mind on his part, as in the case of crimes of strict liability, it may still be possible to see the accessory as having caused the commission of that crime. That would seem to be the position in the case of the "laced" driver with excess alcohol, which was discussed in *A-G's Reference (No 1 of 1975)*.[95]

2.19 We return below to the question of whether cases where the principal crime is one of strict liability are the only category of cases that are, or should be, the subject of the "procurement" limb of aiding and abetting; and to what the limits of that limb of aiding and abetting should be. We should note at this stage, however, that in at least some strict liability cases, including *A-G's Reference (No 1 of 1975)*, it would seem artificial to describe the conduct of the accessory as being the giving of aid or assistance; or as encouragement when, as in a "lacing" case, D's whole object is to conceal from P that he is committing the offence.[96] In this case, therefore, the legal category of aiding and abetting would seem to extend beyond the two basic categories of encouragement and assistance to which we referred earlier.[97]

2.20 Discussion of the role of causation in relation to the terms used in the 1861 Act has tended to be linked with consideration of whether those terms also require "consensus", at least in the limited sense of communication of the accessory's wishes or objectives to the perpetrator. The decision in *A-G's Reference (No 1 of 1975)* makes it clear that no consensus is required for "procuring", since in that case the act of procurement was performed without the knowledge or consent of the principal offender. Counselling and abetting, in the sense

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92 [1990] Crim LR at p.6.

93 *KJM Smith*, pp. 55-93.

94 "The voluntary intervention of a second human agent...is a paradigm among those factors which preclude the assimilation in causal judgments of the first agent's connection with the eventual harm to the case of simple direct manipulation": Hart & Honore, *Causation in the Law* (2nd ed., 1985), p. 74. For this reason we may have been over-cautious in specifically providing in clause 17(3) of the Draft Code, that an accessory does not "cause" the actus reus of the completed crime so as to attract principal liability.

95 See paragraph 2.15 above.

96 See further, *Smith & Hogan*, p. 129.

97 See paragraph 2.12 above.

of encouragement, would seem always to require consensus of some sort: the counsellor cannot incur accessory liability unless the offence counselled is actually committed, and the principal must therefore have consciously acted broadly in line with what the counsellor wanted. However, in the case of aiding, it would seem that no consensus is required. It is perfectly sensible to say that D has "aided" P by, for instance, restraining the policeman who would have prevented P from committing the crime, without P being in any way aware of that assistance having been given to him.

2.21 The upshot, therefore, is that the law as to the implications of the various terms used in section 8 of the 1861 Act, terms which must according to *A-G's Reference (No 1 of 1975)*, be treated as a specific lexicon of the law of aiding and abetting, is probably as stated by Smith and Hogan:

> (i) "procuring" implies causation but not consensus;
> (ii) "abetting" and "counselling" imply consensus but not causation;
> (iii) "aiding" requires actual assistance but neither consensus nor causation.[98]

2.22 This analysis is offered as an exposition of the nature of the actus reus of aiding and abetting, as contained in section 8 of the 1861 Act. As a guide to the basic nature of aiding and abetting, however, it partakes of a considerable element of over-elaboration and indeed artificiality, forced on commentators by the attitude to the specific wording of section 8 that was adopted in *A-G's Reference (No 1 of 1975)*. Procurement, when properly analysed, would seem to fall into a separate category of liability. Otherwise, the conduct complained of in all other cases of aiding and abetting, which form the great majority of the cases covered by the present law, consists of one or other of the basic categories of acts of encouragement or assistance. It will therefore not be in any way misleading if, in the following paragraphs, we discuss the remaining issues which relate to the "actus reus" of aiding and abetting on the basis that that physical element consists either of encouragement or of assistance.

Omissions and neglect[99]

2.23 The criminalisation of behaviour that consists, or arguably consists, only of inaction or omission is a difficult and controversial matter.[100] That is so no less in relation to secondary than in relation to primary liability. Indeed, if all that has to be established in the case of secondary liability is encouragement or assistance of the principal offender, rather than that the accessory in some way caused the principal offence to be committed,[101] then cases are likely to arise quite frequently in which it can be argued that D did indeed assist or encourage P in what he did, by simply standing by while P acted, or by not taking steps

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[98] *Smith & Hogan*, pp. 128-129. Cited with approval, from the fourth edition of Smith & Hogan, by Woolf J in *A-G v Able* [1984] QB 795, at pp. 810H-812C.

[99] *Smith & Hogan*, pp. 130-133; *KJM Smith*, pp. 34-47.

[100] See Law Commission Consultation Paper No 122 (1992), paragraphs 6.1-6.20.

[101] See paragraphs 2.16-2.18 above.

that were open to him to intervene to prevent P's action. However, the more general implications of such arguments have never been considered in the cases, and the Commission's attempts, in the Draft Code, to express the present state of the authorities in a general rule have not been well received.[102]

2.24 Such guidance as is available in the cases concerns two particular issues. First, the extent to which and the circumstances in which secondary liability can be based on the presence of D whilst P is committing the offence. Second, the limits of a doctrine which is to be found in some cases that the physical element required for aiding and abetting may be supplied by a failure to exercise authority or a power of control over the principal offender. We deal with these two issues in turn.

Mere presence

2.25 A person is entitled not to involve himself in the prevention of an offence which he happens to witness.[103] One aspect of this principle is his freedom from complicity in an offence by virtue of mere inactivity.[104] It may, however, be possible to categorise such presence as encouragement, depending on the factual circumstances. Thus, if an accomplice is present in pursuance of an agreement that a crime be committed it appears clear that he need not carry out any positive act in order to be liable.[105] Where there is no such agreement, the evidence of the circumstances of D's presence must establish that he has in fact given either assistance or encouragement, and that he has done so with the intention to assist or encourage.[106] Thus, mere voluntary presence at the scene of a fight is only prima facie evidence that the defendant abets the participants' battery. However, where spectators are invited, for instance to a prize fight,[107] mere presence can be sufficient evidence on which a jury could conclude that the accused was there with the intention of encouraging; after all, without spectators it is unlikely that the offence would be committed. That this approach is correct is supported by the decision in *Wilcox* v. *Jeffrey*, where the defendant's

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[102] See paragraph 2.28-2.29 below.

[103] Hence the abolition by the Criminal Law Act 1967 of the old offence of misprision of felony, which consisted simply of an omission to report a felony to the police.

[104] E.g. in *Smith* v. *Baker* [1971] RTR 350, it was held that for an ordinary passenger to continue to sit beside the driver of a car until the end of the journey after learning that he is uninsured does not amount to complicity in his uninsured driving. The case is different if the passenger has some positive power or duty to control the driver: see paragraphs 2.26-2.27 below.

[105] *Smith* v *Reynolds* [1986] Crim LR 559.

[106] *Clarkson* [1971] 1 WLR 1402.

[107] *Coney* (1882) 8 QBD 534. The prosecution in this case proceeded on the basis of "mere presence" because it could not be shown that the defendant cheered and shouted during the fight; the latter would in itself have constituted positive acts of encouragement.

presence at a concert by a distinguished jazz musician in contravention of the Aliens Order 1920 was sufficient to amount to abetting the musician's offence.[108]

Failure to exercise "control"[109]

2.26 A particular case where a failure to act may amount to participation arises when the defendant has a power to control the actions of another and deliberately refrains from exercising that power. Thus, if a publican stands by and watches his customers drinking after hours he can be guilty of aiding and abetting their offence.[110] Similarly, the owner of a car who sits in the passenger's seat while another drives it recklessly can be convicted of aiding or abetting that offence if he deliberately fails to exercise his power to prevent that driving.[111] The principle has also been applied where death has occurred as a consequence of dangerous driving by a learner driver under supervision by a licence-holder, the supervisor being held liable for aiding and abetting the offence of driving without due care and attention by failing to discharge his duty to control his pupil.[112]

2.27 However, where an accessory is effectively under a duty to exercise his control, the law is vague on the precise steps he needs to take to fulfil that duty. *Rubie* v. *Faulkner* indicates that the question is purely one of fact;[113] but in *Tuck* v. *Robson* it was thought well open to the tribunal of fact to hold that the landlord's calling "Time", "Glasses please" and switching off the main lights were insufficient to revoke his patrons' licence.[114] This suggests that, in some cases at least, extremely demonstrative action might be required, and indicates that the control principle is capable of imposing an onerous duty.[115]

2.28 In clause 27(3) of the Draft Code we expressed these rules of the common law by saying that assistance or encouragement for the purposes of aiding and abetting included "assistance or encouragement arising from a failure by a person to take reasonable steps to exercise any authority or discharge any duty". We indicated, however, that the cases were not at all easy to interpret, and that the principle itself had been criticised in the course of the

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[108] [1951] 1 All ER 464. Further evidence that the defendant's intent was to encourage, was provided by his behaviour, laudatory of the performer, before and after the concert.

[109] *Smith & Hogan*, pp. 132-133; *KJM Smith*, pp. 39-47.

[110] *Tuck* v. *Robson* [1970] 1 WLR 741.

[111] *Du Cros* v. *Lambourne* [1907] 1 K.B. 40. *Aliter* if the accomplice were a passenger in the perpetrator's own car: *Smith* v. *Baker*, n. 104 above.

[112] *Rubie* v. *Faulkner* [1940] 1 K.B. 571, and *Harris* [1964] Crim LR 54.

[113] [1940] 1 K.B. 571, at p. 574.

[114] [1970] 1 WLR at pp. 746-747.

[115] This point is forcefully made by Professor Glanville Williams in *Textbook of Criminal Law* (2nd ed., 1983) p. 348, and [1990] Crim LR 780.

Code exercise.[116] However, since we were satisfied that the principle was indeed one enshrined in the common law, its inclusion in the Draft Code was inescapable, given that the object of that document was restatement of the law, and not its reform.

2.29 That part of the Draft Code has attracted criticism in vigorous terms, both in respect of whether it accurately represents the current law, and in respect of whether the law should be as stated in the Draft Code.[117] In view of that criticism, it may be relevant to stress that the "control" principle discussed above presupposes the general rule that simple passivity does not, without more, constitute accessory conduct.[118] The control principle simply establishes a qualification to that general statement, to the effect that breach of duty can found accessory liability *provided always* that the accessory's breach can be shown in fact to have amounted to assistance or encouragement. The latter point is purely a question of fact; and we are sorry if the formulation of clause 27(3) of the Draft Code has misled some into thinking it to provide that a breach of duty is deemed, as a matter of law, to amount to accessory conduct.

2.30 These disputes however only serve to demonstrate further that both the exact terms of present law on the extent to which passivity or inaction can found accessory liability; and the policy that the law should adopt in that regard; are highly difficult and controversial. The present exercise gives an opportunity, which the codification exercise under the Draft Code did not,[119] to review all these questions from the point of view of law reform.

Assisting crime by performing a legal duty

2.31 There may be a principle, of uncertain extent and terms, that a person, even if he otherwise fulfils the requirements for accessory liability, cannot become an accessory to a crime by committing an act that he is under a legal duty to perform. The cases, and hypothetical situations, that have given rise to this issue are commonly discussed in relation to the mens rea of complicity.[120] In the Draft Code we sought to explain them under the terms of a specific defence to accessory liability which, however, turned to some extent on the collateral motive of the person performing the legal duty.[121] These cases do indeed provoke serious doubt as to the required mental element in complicity, and we shall return to them in that context;[122] but we must confront here the different question of whether, irrespective of his purpose or intentions, someone whose act of assistance involves the

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[116] Code Report, para. 9.23.

[117] Professor Glanville Williams, *Letting Offences Happen*, [1990] Crim LR 780.

[118] See paragraph 2.25 above.

[119] Cf Professor Williams at [1990] Crim LR p. 782.

[120] *Smith & Hogan* pp. 135-137.

[121] Draft Code, clause 27(6)(c); Code Report para. 9.28.

[122] See paragraphs 2.59-2.62 below.

performance of a legal duty does not even potentially fall within the requirements of accessory liability.

2.32 In the briefly reported and (apparently) briefly argued case of *Lomas*[123] the defendant, in possession of a jemmy belonging to a burglar, returned it to the latter at his request. The owner subsequently used the jemmy to commit a burglary, but the defendant was acquitted of liability as an accessory. In *NCB v Gamble*[124] Devlin J sought to explain this outcome against the background of the general principle of liability for complicity, which he considered to be that

> "a person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting".

Devlin J acknowledged that facts such as those of *Lomas* could be analysed in terms of the mens rea of complicity. However, he also held that, under the general statement of the law set out above, "supply" requires a positive act, and "a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue". Accordingly, in *Gamble* itself, where the Board was accused of aiding the use of an overloaded vehicle on a public road by permitting a lorry used for the purchase of coal from its premises to leave in an overloaded state, liability was held to turn on when the property in the coal passed between the Board and its customer. The Board already knew of the overload, and thus the threatened illegality, before property passed, at a time when it could have asserted its still surviving rights of ownership to prevent the sale in that form and thus the removal of excess goods on to the public road. The principle apparently adumbrated in *Lomas* therefore did not assist it.

2.33 It is however difficult or impossible to state with certainty the content of this "principle", or indeed whether it exists as a separate principle of law at all. The distinction drawn by Devlin J between positive and negative acts is very difficult to generalise; and the appeal to civil law concepts contained in the reference to Lomas's having simply refrained from detinue is uncertain in its scope, potentially productive of great complexity and, it has to be said, doubtful as a matter of policy. That can be demonstrated by the position of a shopkeeper or other vendor of materials who enters into a contract of supply. In *Gamble* it was held, or perhaps more accurately assumed, that the Coal Board was not, under its running contract for the supply of coal, bound to deliver any particular amount of coal at any particular moment.[125] It would seem that, if the Board had been contractually bound to deliver the goods, the fact that it was performing that contract would have exempted it from complicity in the offence for which, as the Board knew, that supply was an essential ingredient: avoidance of breach of contract being not obviously different, as a consideration affecting the nature of the accused's act, from avoidance of detinue. It must however be at

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[123] (1913) Cr App R 220.

[124] [1959] 1 QB 11 at p. 20.

[125] Per Lord Goddard CJ [1959] 1 QB at p. 19.

least open to question whether criminal liability that would otherwise attach should be removed just because the accused acted to protect his own private law interests.

2.34 These considerations indicate that, whatever the principle that was actually applied in *Lomas* and *NCB v Gamble*, the questions posed by these cases are not best solved by formal rules as to the nature of the alleged accessory's "act", particularly if those rules are based on technical concepts of the civil law. The problem is better viewed as a part of a more general question, namely whether suppliers, at least suppliers in the general course of their business, should be liable as accessories at all. That there is no present rule exempting suppliers generally is shown by the need perceived in *NCB v Gamble* to determine whether the relationship between the parties had passed beyond mere "supply" to a civil law *obligation* to deliver the goods. Whether and by what methods suppliers of goods known or suspected to be for use in crime should be exempted from accessory liability has, however, long been the subject of debate from the point of view of law reform,[126] and we take up that debate in paragraphs 4.113ff below.

The commission of the offence by the principal

2.35 As we have already noted,[127] the doctrine of complicity requires that there must be an offence committed by the perpetrator before the issue of a secondary party's liability for that offence can arise. The concept is expressed in a long-standing passage in Russell:

> "...when the law relating to principals and accessories as such is under consideration there is only one crime, although there may be more than one person criminally liable in respect of it;...There is one crime, and that it has been committed must be established before there can be any question of criminal guilt of participation in it."[128]

The need for a principal offence is graphically illustrated by *Thornton* v. *Mitchell*,[129] where the driver of a bus, relying on the signals of his conductor, reversed and knocked down two pedestrians. The driver was charged with driving without due care and attention and the conductor with aiding and abetting him. The driver was acquitted and it was held by the Divisional Court that the conductor would thus have to be acquitted also.

2.36 However, it is clear that the modern law does not require the principal offence to be evidenced by the prior or contemporaneous *conviction* of the perpetrator. For instance, an accomplice can be convicted even though the perpetrator is not prosecuted or is even exempt

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[126] See e.g. Glanville Williams, *Criminal Law: the General Part* (2nd edition, 1960), at p. 373.

[127] Paragraph 1.11, n. 18, above.

[128] *Russell on Crime* (12th ed. 1964, by JWC Turner), p. 128.

[129] [1940] 1 All ER 339.

from prosecution by a special rule of law.[130] An accomplice can also be convicted when the perpetrator is unknown, as long as it is established that the primary offence has been committed.[131] Indeed, an accomplice may be liable even when the principal has been tried and acquitted. Although it would be illogical for the perpetrator to be acquitted and the accomplice convicted when the evidence against each is identical, the evidence will often differ and in such an event different verdicts against perpetrator and accomplice will not be logically incoherent.[132]

2.37 However, the general principle that a person cannot be convicted of complicity in a crime that has not been committed must be qualified in one special respect, where there are two crimes with the same actus reus but different *mens rea*.[133] If an accomplice acts with the mens rea of the lesser offence and the perpetrator with that of the greater offence, *Reid*[134] shows that the accomplice may be convicted of manslaughter only, while the perpetrator is guilty of murder. In the reverse case, where it is the accomplice who has the greater mens rea, the opinions in the House of Lords in *Howe* make it clear that the accomplice may be convicted of the more serious offence. In that case, Lord Mackay said that:

> "where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted of the reduced charge of manslaughter for some reason special to himself does not, in my opinion, in any way result in a compulsory reduction for the other participant."[135]

2.38 The Court of Appeal had earlier asserted in *Richards*[136] that the accomplice's liability could not rise higher than that of the perpetrator, and although the policy reasons for so doing are strong, the position adopted in *Howe* would appear to depart clearly from

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[130] *Austin* [1981] 1 All ER 374. D had assisted a father to snatch his child from his estranged wife. The father was held to have committed the offence under s. 56 of the Offences against the Person Act 1861 of taking away a child by force from the possession of his parent, but was saved from *prosecution* by the proviso to the section, that no-one who claimed a right to the possession of a child "s[hould] be liable to be prosecuted by virtue hereof".

[131] *Anthony* [1965] 2 QB 189.

[132] *Humphreys & Turner* [1965] 3 All ER 689, where a confession by D could be used to prove, as against D, that P had committed the offence and that D had aided him; but was inadmissible against P, who was acquitted.

[133] For example, murder and manslaughter, or charges under sections 18 and 20 of the Offences against the Person Act 1861.

[134] (1976) 62 Cr App R 109.

[135] [1987] AC 417, at p. 445.

[136] [1974] QB 776.

orthodox complicity theory that insists on the parties' sharing in liability for *one* offence.[137] It should be noted that Lord Mackay's opinion is limited to circumstances where the perpetrator is liable for the lesser offence because of "some reason special to himself". The rule would not seem to apply if, for instance, the perpetrator was guilty of manslaughter rather than murder simply because the gun, with which he had intended to kill, went off accidentally.[138] It would seem to be crucial to the decision in *Howe* that the actus reus of the crime for which the accomplice was found liable had in fact been committed. It is this factor which distinguishes *Howe* from the basic rule stated in *Thornton* v. *Mitchell*, since in that case no actus reus whatsoever had occurred.[139]

The guilty accessory and the innocent principal

2.39 This problem can be regarded as a particular aspect of the rule that liability for aiding and abetting cannot arise unless a principal crime has in fact been committed. That latter rule will normally come into play when P, a person with full and conscious intention of committing a crime, and having been encouraged or assisted to that end by D, in the event does not carry through his plans: he may for instance not succeed in finding anything worth stealing in the house that he has entered, or may simply be arrested on the way to the burglary. That situation, and the inability then to direct any legal sanctions at D, does give rise to questions as to whether the rule that the principal crime must be committed puts an undue constraint on the law of secondary liability. Those general policy issues are debated at length in paragraphs 3.17-3.27 below. Our present concerns are, however, of a more particular nature.

2.40 In the case just mentioned, P is (in the moral sense) guilty, and it is only by accident that that moral guilt does not ripen into legal guilt as well. There can, however, be cases where the absence of a principal offence is attributable, not to factual chance of the type just mentioned, but to absence on the part of P of the necessary mental element for the commission of the principal crime. Thus, for instance, if P believed that he was the rightful owner of a painting possessed by X, and D kept watch whilst P removed the painting from X's premises, because P had not acted dishonestly there would be no principal crime of theft or burglary even if the painting in fact belonged to X: and thus no secondary liability on D's part.

2.41 These cases in general also present no special problem. There is, however, a particular class of such case where, to put the matter in broadly moralising terms, D is the

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[137] See the citation from *Russell* at n. 128 above. This departure may be compared with the equally prudent decision in *Bainbridge* [1960] 1 QB 129 that D may be an accessory to P's crime even though he intended or foresaw not that crime but only another crime of the same "type": see paragraphs 2.70-2.79 below.

[138] See *Smith & Hogan*, p. 151.

[139] "A person cannot aid another in doing something which that other has not done": Avery J in *Morris* v. *Tolman* [1923] 1 KB 166 at p. 171, cited by Lord Hewart CJ in *Thornton* v. *Mitchell* [1940] 1 All ER at p. 341c.

actively culpable party. Such cases are usually, though not exclusively,[140] ones where P's innocence is attributable to some deception or threat practised on him by D: for instance, in the example given above, if D had a grudge against X, and to inconvenience X had deceived P into thinking that the picture was P's property. These cases require rather particular facts, but they are not wholly hypothetical, as the account below will show. The problem of what to do with such "guilty" accessories to non-existent crimes has been the subject of much debate in recent discussion of the law of complicity, and when it does arise it evokes issues of undoubted social importance. We therefore have to accord the question more attention than its simple incidence in the cases might be thought to warrant.

2.42 *Thornton* v *Mitchell*, already discussed,[141] is in fact an example of this problem. Although the point is not taken in terms in the report, it seems likely that the driver was acquitted of driving without due care and attention because his collision with the unfortunate pedestrian was caused solely by his reasonable reliance on the, in the event very negligent, directions of his conductor. But the conductor, whose fault it all was, could not be convicted as an accessory, because of the innocence of his principal; and could not be convicted as a principal because his conduct did not fit the statutory definition of the offence as only capable of being committed by one who was "driving".

2.43 These were, however, comparatively mild concerns compared with the traumas of two subsequent and more lurid and famous cases. In *Bourne*[142] a man compelled his wife to have intercourse with a dog and was charged with aiding and abetting her to commit buggery. The Court of Criminal Appeal proceeded on the basis that, if she had been tried, the wife would have had the defence of duress but held that, nevertheless, Bourne's conviction as an accomplice could stand. The opinion of Lord Goddard CJ was that the fact that the defence of duress excused the wife from *punishment* did not mean that no *offence* had occurred. On this basis, there would appear to have been a foundational offence on which Bourne's liability was contingent. A similar result was achieved in *Cogan & Leak*,[143] where the defendant Leak terrorised his wife into submitting to intercourse with Cogan. On appeal, Cogan's conviction was quashed on the basis that he believed the victim to be consenting; but Leak's conviction for aiding and abetting was upheld, on two alternative grounds. The first involved the imposition of *principal* liability, by a novel application of the doctrine of innocent agency: that "her ravishment had come about because Leak had wanted it to happen and had taken action to see that it did by persuading Cogan to use his body as the instrument for the necessary physical act".[144] The second ground appears similar to the approach to *accessory* liability in *Bourne*, in that although Cogan was innocent of the *crime* of rape a "rape" of the wife had still taken place. As Lawton LJ said:

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[140] See the discussion of *Thornton v Mitchell* in paragraph 2.42 below.

[141] See paragraph 2.35 above.

[142] (1953) 36 Cr App R 125.

[143] [1976] QB 217.

[144] [1976] QB 217, at p. 223B-C.

"In the language of the law the act of sexual intercourse without the wife's consent was the actus reus: it had been procured by Leak who had the appropriate mens rea, namely his intention that Cogan should have sexual intercourse with her without her consent."[145]

2.44 While the obtaining of a conviction in both these cases is difficult to criticise, the conceptual confusion involved in achieving that result makes a coherent statement of the law in this area virtually impossible. One unifying theory apparent in both cases suggests that, though the perpetrator escapes liability because of a lack of mens rea or the existence of a defence, the necessary foundational offence has still taken place. However, to state that a perpetrator lacks the necessary mens rea is simply another way of saying that the definitional requirements of the principal offence have not been fulfilled. The main concern is, no doubt, that the moral and, in all but a technical sense, criminal harm inflicted by the perpetrator should not go unpunished where the accomplice has played an instigative role; and that view is accommodated by some of the leading commentators who suggest that, where the perpetrator has a personal defence or lacks mens rea, the law of complicity allows the mens rea of the accomplice to be added to the actus reus of the perpetrator to establish the liability of the accomplice. On this view, therefore, the accessory is liable for abetting or counselling, not a *crime*, but a "mere *actus reus*".[146]

2.45 When formulating the Draft Code we concluded that this policy of treating such cases as ones of accessoryship gave rise to serious difficulties: in particular, that simply to designate, for instance, Mr Bourne as an accessory to his wife's "crime" not only sounded odd in ordinary language, but also made difficult and artificial the application, to such a case, of the rules of accessory liability.[147] We therefore suggested a solution[148] based on principal, rather than accessory, liability, and linked to the doctrine of innocent agency;[149] but we recognised that that solution might not necessarily reflect existing law.[150] In an orthodox innocent agency case, for instance where the accused sends a small child to "steal" some property, it abuses neither language nor common sense to say that the accused thereby does the thing, appropriating property belonging to another, required for conviction of theft. But in a case like *Cogan and Leak* it is simply wrong to say, *pace* the Court of Appeal as

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[145] *Ibid.*, at p. 223C.

[146] *Smith & Hogan*, p. 153; Cross, Jones & Card, *Introduction to Criminal Law* (11th ed., 1988), p. 596.

[147] Code Report, paragraph 9.11 (ii)-(iii). The most obvious such obstacle is, of course, the basic rule that the accessory can only be so liable in respect of a crime that has actually been committed. That must mean, that the "principal" is convictable of the offence abetted; in *Bourne* the doctrine of duress prevented such a conviction, and in *Cogan and Leak* Cogan did not have the necessary mens rea of recklessness as to the victim's consent.

[148] Draft Code, clause 26(1)(c) and (3).

[149] See paragraphs 1.15-1.18 above.

[150] See Code Report, paragraph 9.9.

quoted in paragraph 2.43 above, that Mr Leak had intercourse with his wife, when the only person who did the acts constituting such intercourse was Cogan.[151]

2.46 In order to accommodate these problems we provided, in clause 26(3)(a) of the Draft Code, that a conviction as a principal would be possible where the accused, "with the fault required for the offence", procured the doing of the act or acts specified for the offence, "notwithstanding that the definition of the offence implies that the specified act or acts must be done by the offender personally." That provision recognised, for the purposes of a codification exercise, the troublesome oddity of cases of the sort just mentioned;[152] and it does indeed represent the law as it was assumed to be in *Cogan and Leak*. However, the present exercise affords an opportunity, unconstrained by the conceptual limitations of the present law by which we were bound in formulating the Draft Code, to reconsider how such cases might be dealt with. We therefore return to this issue in paragraphs 4.202-4.210 below.

The Mental Element in Aiding and Abetting

Preliminary

2.47 The mental element or mens rea that has to be established in order to convict of aiding and abetting or complicity has recently been the subject of extensive debate.[153] That debate has been fuelled, and made more difficult, by the uncertain and to some extent contradictory nature of the language used in the cases. As a leading commentator puts it:

> "The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose to bring about the crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula that embraces recklessness."[154]

2.48 Some of these verbal difficulties are, however, caused by factors particular to aiding and abetting, that have not always been sufficiently taken into account in attempts to expound the subject. We venture to mention here some particular points that we have found it helpful to keep in mind when considering the cases and the commentaries upon them.

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[151] This leaves out of account the further problems, in the particular case of rape, that (i) on the law as it was understood at the time of the case, a husband could not in law be convicted of raping his wife, and there is difficulty maintaining at the same time the propositions that (a) what Leak did amounted to rape in law, but (b) the way in which he committed that rape took him outside the exception to the law of rape just mentioned; and (ii) on the Court of Appeal's reasoning *principal* liability would still have attached if the coercion had been not by Mrs Leak's husband but by her mother-in-law, despite rape being then and now a crime that can only be committed by a man.

[152] Code Report, paragraph 9.12.

[153] For references, see paragraph 1.9, n.11, above.

[154] Glanville Williams, [1990] Crim LR at p.4.

2.49 First, secondary liability differs from primary liability in that, fairly obviously, the accessory is convicted not for himself committing the actus reus of a particular offence, but because of his association with the commission of such an offence by the principal offender. The exact nature of that association is a matter of some difficulty: see paragraphs 2.10-2.22 above. However, this structure of secondary liability requires decisions to be taken not only about the mental attitude of the accessory to his own conduct, that is alleged to constitute the act of aiding or abetting, and to the acts of the principal offender that constitute the principal offence, but also to the mental state of the principal that is an essential ingredient of the principal crime. This two-fold structure of complicity means that general formulae, that express the accessory's required mens rea in terms of a single mental state (for instance, "intent to aid",[155] "purpose to assist", or "intentional assistance or encouragement"[156]) must be approached with caution.

2.50 Second, the two-fold structure of complicity also causes difficulty if it is sought simply to transfer to complicity the terms and definitions used in defining and describing the mental element of a principal offender. In particular, the most widely favoured definition or description of an intended result is one that it is the actor's purpose to cause.[157] In at least some aspects of complicity, however, it is very doubtful whether the accessory's liability does or can rest upon any notion of causation of the principal's conduct.[158] Therefore, if it were sought to introduce notions of intention or purpose into a general definition of complicity liability, it would seem that the object addressed will have to be the *attitude* of the principal offender, rather than his actual *commission* of the principal offence.

2.51 Third, even if that seems too literal an approach, and the mens rea of aiding and abetting can relate to the actual commission of the principal offence, nonetheless purpose or intention in relation to another person's acts is a difficult concept to handle, particularly when, as in the case of simply *assisting* an offender, that person has already decided to commit those acts, or is even already in the course of committing them. That is one reason why concepts of knowledge or awareness that the principal is committing, or is going to commit, an offence, rather than intention or purpose that he should commit that offence, play a large part in discussions of the mens rea of aiding and abetting.

2.52 Fourth, the law of "aiding and abetting" encompasses a very wide range of different types of conduct. Even if the "aid, abet, counsel or procure" of the Accessories and Abettors

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[155] E.g. per Devlin J in *NCB v Gamble* [1959] 1 QB at p. 20.

[156] Per Wilson J in the majority judgment of the High Court of Australia in *Giorgianni* (1985) 156 CLR 473 at p.506.

[157] This formulation is adopted in clause 2(a)(i) of the Bill included in LCCP No. 122, as a refinement of the definition adopted in clause 18(b)(ii) of the Draft Code: see LCCP No. 122 (1992), at paragraphs 5.4-5.6. The view that the concept of intention in law is best expressed in terms of purpose, in the sense of conscious attempts to cause a result, is now well established: see for instance Lord Hailsham in *Hyam* [1975] AC 55 at p. 74B; Lord Simon of Glaisdale in *DPP v Morgan* [1976] AC 182 at p. 217D; and Lord Goff of Chievely (1988), 104 LQR at pp. 42-43.

[158] See paragraphs 2.15-2.22, above.

Act 1861 is thought to be a too elaborate or detailed statement of the modern law,[159] there is no doubt that a more specific statement of the conduct prohibited by that law would cover at least two different activities: encouraging the perpetrator in his decision to commit the offence; and assisting him in committing the offence.[160] It is hardly surprising that it is difficult to formulate any rule or description that in the same terms accurately encompasses the required mental element of the accessory in these two very different cases. In the former category, encouraging the perpetrator in his decision to commit the offence, the mental state of the accessory is in effect specified, as a matter of definition, by the description of the physical content of the accessory's acts: since it would be unusual to be able to say that D influenced P to do *x* if D did not have the intent or purpose P should do *x*. However, the case of undirected, that is to say non-purposive or accidental, influence must also be brought into consideration, though there is considerable controversy as to how far, if at all, such facts should form the basis of a complicity charge.[161] By contrast, non-purposive action on the part of the alleged accessory plays a much more central role in consideration of the other main category of complicity, assistance, because to say that D assisted P to do *x*, which is the nub of the accessory's liability, says nothing about whether it was D's purpose that P should, or even about whether it was within D's knowledge that P would, do *x*. A single mens rea formula is unlikely accurately to cover all the implications of these very varied cases.

2.53 Fifth, formulations of the mens rea of aiding and abetting, like all other aspects of that crime, are bound to be strongly influenced by the overriding rule that a person can only be guilty of aiding and abetting a principal crime that is actually committed.[162] In particular, there is an understandable reluctance to allow a person to escape criminal sanctions when he has clearly been willing to give assistance in a criminal project, and the criminal intentions of his principal have been carried into effect, but in some form different from that envisaged by the assister. That has led to the introduction of special rules to cover such cases;[163] but also to problems in the formulation of the accessory's required mental state. If the accessory is accused of assisting in a crime that is actually in the course of commission, for instance when a look-out keeps watch outside a house that is being burgled, there is no danger to law enforcement, and no logical incoherence, in requiring knowledge on the accessory's part that that particular burglary is being committed. But if the accessory is not present at the scene, but merely assists in advance, a requirement of *knowledge* of a particular offence in the future may be not only logically unsound, since one cannot "know" the future, but also unduly limiting from the point of view of law enforcement.

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[159] See paragraphs 2.8-2.9 above.

[160] See paragraph 2.10 above. These two categories of activity of course overlap in practice, but there is no suggestion, nor could there be any suggestion, that they are co-extensive. We discuss further in paragraphs 4.192-4.196 below whether these categories are or should be the *only* categories of behaviour that found complicity liability.

[161] See paragraphs 2.59-2.62 and 2.70-2.79 below.

[162] Paragraphs 1.11 and 2.35-2.46 above.

[163] See paragraphs 2.70-2.79 and 2.108-2.125 below.

2.54 In the Draft Code we were constrained, in pursuit of the objective of codification of the present common law, to follow current practice and to attempt to state the fault requirement for all accessory liability in a single formula, albeit a formula of some complexity.[164] In the treatment that follows we shall not adopt that approach. Instead we shall seek to set out the somewhat disparate elements of a body of law that in reality, and for some of the reasons set out above, does not lend itself to complete and accurate statement by means of a single statutory provision.

Mental element: the basic requirements

2.55 Despite uncertainty about a range of important matters, there is a substantial degree of agreement on the minimum requirements for accessory liability:

> "It must be proved that D intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime. That is not the same thing as an intention that the crime be committed."[165]

> "An accessory must both intend his acts of assistance or encouragement and be aware of their ability to assist or encourage the principal offender".[166]

> "It must, at the least, be shown that the accused contemplated that his act would or might bring about or assist the commission of the principal offence: he must have been prepared nevertheless to do his own act, and he must have done that act intentionally".[167]

2.56 These statements relate to the accused's knowledge of the propensity of his own acts to assist in the commission of the principal crime. That latter expression does not however make explicit the additional requirement that when so acting the accessory must also be aware of all the elements that in law constitute that principal offence, including the mental element that is required in law on the part of the principal offender:

> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is no defence."[168]

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[164] Draft Code, clause 27(1); Code Report, paragraphs 9.24-9.28.

[165] *Smith & Hogan*, p. 133, citing, as to the last point, Devlin J in *NCB* v *Gamble* [1959] 1 QB 11 at p. 23.

[166] *KJM Smith*, p. 141.

[167] *Blakely and Sutton v Chief Constable of West Mercia* [1991] RTR 405, per McCullough J at p. 415J.

[168] *Johnson* v. *Youden* [1950] 1 KB 544 at p.546, per Lord Goddard CJ, quoted in *Smith & Hogan* p. 137, n. 13. Those essential matters include the fault with which the principal is required to act: Code Report, paragraph 9.28.

This generally-stated requirement of "knowledge"[169] of the elements of the principal crime fairly obviously sits more easily with a case where the accessory's assistance is contemporaneous with the commission of that crime, than when the assistance is offered in respect of criminal activities that are to take place in the future.[170] The undoubted requirement, encapsulated in the citation from *Johnson* v. *Youden* at footnote 168 above, that the accessory should have some sort of subjective awareness of the elements of the principal crime, has, therefore, to be expressed in somewhat different terms when that crime is merely in prospect.

2.57 It is not clear with what degree of certainty the accessory must "know" the facts constituting the commission of a *future* principal crime. Discussion of this point is bedeviled by the constant use of the language of knowledge or, even, of intention, in relation to the (future) facts of the offence actually committed. In such a case, as the matters referred to lie in the future, the accessory's state of mind can only at best be one of belief, foresight or suspicion. In *Gillick*, in a passage approved by Lords Scarman and Bridge in the House of Lords,[171] Woolf J said that

> "In order to be an accessory, you normally have to know the material circumstances. [When prescribing contraceptives as a precautionary measure] the doctor would know no more than that there was a risk of sexual intercourse taking place at an unidentified place with an unidentified man on an unidentified date, hardly the state of knowledge which is normally associated with an accessory before the fact."[172]

Woolf J thus appears to suggest that knowledge of a *risk* of those future events does not suffice for accessory liability. That formulation, which apparently requires as a minimum confidence, rather than mere suspicion, as to the principal's intentions, is however difficult to square with the more general statements of the mental element we have cited above,[173] which seem to contemplate mere awareness that the principal crime might be committed.

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[169] Some difficulty has been caused by the issue of whether "knowledge" in this context includes the condition known as wilful blindness, that is, the avoidance of taking steps that might confirm the existence of a fact. We doubt whether it is generally the law that any reference to knowledge necessarily imports a reference to wilful blindness: see LCCP No. 122, at paragraph 5.15. *Smith & Hogan*, at p. 137, assume that in the present context wilful blindness is necessarily included in statements of the mental element that refer to knowledge or awareness, but the state of the authorities on the point is obscure: see McCullough J in *Blakely and Sutton* [1991] RTR 405, at pp. 414H-415G, commenting on the remarks of Lord Goddard CJ in *Davies, Turner & Co* v. *Brodie* [1954] 1 WLR 1364 at p.1367. In *Stanton* v. *Webber* [1972] Crim LR 522 a strong Divisional Court accepted that constructive knowledge, in the sense of "a wilful shutting of the eyes", was enough, but emphasised that the objective fault of laxity in the carrying out of a duty of care was insufficient to convict of aiding and abetting.

[170] Cf paragraph 2.53 above.

[171] [1986] AC 112, at pp. 190D and 194F respectively.

[172] [1984] QB 581, at p. 595D-E.

[173] See paragraph 2.55 above.

2.58 In the Draft Code[174] we suggested the law to be that one is guilty as an accessory if

> "he intends that the principal shall act, or is aware that he is or may be acting, or that he may act, with the fault (if any) required for the offence."

For that formulation we relied[175] on authority in relation to joint enterprise, which doctrine, we have to acknowledge, may proceed on different principles from those governing accessoryship;[176] and the Code's formulation has certainly not gone uncriticised.[177] Nevertheless, there is no case which rejects the awareness of the mere possibility of the commission of the principal offence as a ground of accessory liability, and at least some authority that seems to support that analysis. Thus, in *Carter* v. *Richardson*[178] the offence was in the course of commission, and it was held to be sufficient that the accessory knew that the facts constituting the offence were "probable": in effect, that he was subjectively reckless as to the commission of the offence. That approach, applied to offences to be committed in the future, may well entail a conviction for complicity where there is mere suspicion that the principal crime will be committed.

Good motive

2.59 Motive, in the sense of the accused's reason for acting as he did, is as a matter of principle irrelevant to criminal liability.[179] That rule was until recently thought to apply to accessory as much as to principal liability;[180] but as some doubt has recently been cast on the point it must be reviewed here. It should be noted that this issue of good motive is often confused, in the cases as well as in the commentaries, with the different question, considered in paragraphs 2.63ff below, of whether the accomplice must have it as his *purpose* that the

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[174] Clause 27(1)(c).

[175] Code Report, paragraph 9.28.

[176] See paragraphs 2.108-2.125 below.

[177] See paragraph 3.12 below.

[178] [1974] RTR 314, cited in that sense in *Smith & Hogan*, p. 137, n. 16.

[179] *Smith & Hogan*, p. 79: "If D causes an *actus reus* with *mens rea*, he is guilty of the crime and it is entirely irrelevant to his guilt that he had a good motive". For completeness in the present context one should perhaps add that D will not be guilty if he can rely on one of the recognised defences to criminal liability. Some of these, such as the defence of use of force in public or private defence that is expounded in section III.G of LCCP No. 122 (1992), refer to what, in popular terms, might be thought to be considerations of "motive". The point remains, however, that there is no *general* doctrine of exculpatory explanation: excuses will not serve the accused unless they fall into one of the defined categories of defence recognised by law.

[180] "It is the intention to do the acts of assistance or encouragement which must be proved. If D has that intention it is no defence that his motives were unimpeachable": *Smith & Hogan*, p. 133.

principal crime should be committed.[181] These two questions are, however, directed at different issues. The "purpose" question relates to the basic definition of the offence of aiding and abetting:[182] that is, with whether it is necessary in law to show, as the mental element of that offence, that the accessory's actions were directed at seeking to bring about the commission of the principal crime, as opposed to simply knowingly assisting in the commission of that crime. It is an entirely different enquiry to ask whether there is or should be a defence or exculpation, even if the accessory is found to have acted with the defined mental element of the offence, based on the goodness of the motive with which he acted.

2.60 The issue of motive has been brought back into consideration in accessoryship by *Gillick v West Norfolk and Wisbech Health Authority*.[183] The Department of Health and Social Security issued advice to health authorities that a doctor consulted at a family planning clinic by a girl under 16 would not be acting unlawfully if he prescribed contraceptives for her, so long as he was acting in good faith to protect her against the harmful effects of sexual intercourse. A declaration was sought claiming, inter alia, that the advice was unlawful because a doctor so acting would commit the offence of being an accessory to unlawful intercourse with a girl under the age of 16, contrary to section 6(1) of the Sexual Offences Act 1956.[184]

2.61 Lord Brandon was of the opinion that the provision of contraceptive advice largely removed the inhibition, caused by the threat of unwanted pregnancy, that would otherwise attach to both parties; and thus necessarily involved the promoting, encouraging or facilitating of unlawful intercourse.[185] On that view of the facts, there would be no answer to a charge of accessory liability. However, Lords Scarman and Bridge, the other judges who directly considered the issue of accessoryship, adopted the judgment of Woolf J at first instance.[186]

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[181] This is largely because the word "motive" is often used to mean "purpose". Thus, in *NCB v Gamble* [1959] 1 QB at p. 26 the dissentient Slade J said that to be liable for complicity the accessory's act or omission must be "done or made with a view to assisting or encouraging the principal offender...in other words, with a motive of endorsing the commission of the offence." That conclusion was rejected by Lord Simon in *DPP for Northern Ireland* v. *Lynch* [1975] AC at p. 699 ("Slade J thought the very concept of aiding and abetting imported the concept of motive. But Lord Goddard CJ and Devlin J disagreed with this. So do I"). This debate clearly relates to the issue of whether the accessory must have as his purpose the commission of the principal crime. However, in *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] QB 581 at p. 589 Woolf J relied on these exchanges for the different conclusion that "even if your motives are unimpeachable, if you in fact assist in the commission of an offence...you are an accessory". *Smith & Hogan*, at pp. 133-134, adopt the latter statement, as well as quotations from *Lynch*, as authority that the orthodox view is that good motive is no defence if the legal requirements of accessoryship are otherwise satisfied.

[182] In the terms of the quotation from *Smith & Hogan* in n. 179 above, it is a question of the *mens rea* of the crime of aiding and abetting.

[183] [1986] AC 112: hereinafter "*Gillick*".

[184] Which provides that "It is an offence...for a man to have unlawful sexual intercourse with a girl under the age of sixteen".

[185] [1986] AC 112, at p. 197.

[186] [1984] QB 581 at pp. 593-595.

He had concluded, on grounds that related to the intention or knowledge of the abettor in relation to the commission of the principal offence, that "while a doctor could, in following the [DHSS] guidance, so encourage unlawful sexual intercourse as to render his conduct criminal, in the majority of situations the probabilities are that a doctor will be able to follow the advice without rendering himself liable to criminal proceedings".[187] Since, in order to obtain the declaration sought, the plaintiff had to show that in no circumstances could a doctor lawfully give contraceptive advice to a girl aged under 16,[188] that should have been the end of the matter. However, Lord Scarman, immediately after his adoption of Woolf J's analysis, went on to say that

> "The bona fide exercise by a doctor of his clinical judgement must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."[189]

2.62 His Lordship did not indicate further what was meant in this context by "negation of the guilty mind", nor whether the considerations referred to were specific to that case or of more general application. It is difficult, however, to interpret Lord Scarman's observations, and some similar observations by Lord Fraser,[190] as doing other than reintroduce into the law of accessoryship an overall defence of "good motive". There would appear to be no other authority, and as we have observed above no justification in principle, for such a defence. In the Draft Code we suggested that the effect of these observations might be more limited, in that they merely recognised a defence that a person, otherwise an accessory, had acted with the purpose of avoiding or limiting any harmful consequences of the principal offence and without the purpose of furthering its commission.[191] There is, however, no other authority for even that more limited defence, and it must be very doubtful whether it exists in the present law. Whether it is necessary and desirable that there should be such a defence to a charge of accessoryship is, therefore, an issue of law reform: which we review in paragraphs 4.121ff below.

Purpose

2.63 An issue that has recently caused much uncertainty is whether, in addition to the basic requirement that the accessory must know or be aware that his acts will encourage or assist the commission of the principal crime,[192] the accessory must have as his "purpose" that that crime should be committed. This issue has not been consciously confronted by the courts in

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[187] [1984] QB at p. 595.

[188] [1986] 1 AC at p.165E, per Lord Fraser.

[189] [1986] 1 AC at p. 190G.

[190] [1986] 1 AC at p. 175.

[191] Draft Code, clause 27(6)(b); Code Report, paragraphs 9.34-9.35. See also *KJM Smith* at pp. 148-149.

[192] See paragraph 2.55 above.

this jurisdiction, but it is undoubtedly raised by some of the recent authorities.[193] The question is of considerable importance, since if *mere* knowledge that his conduct is likely to assist in the commission of a crime is enough to convict an accessory, a very wide range of conduct may be subject to criminal sanctions. It was on that basis that Lord Brandon in *Gillick* thought that a doctor who provided contraceptive advice to a girl under the age of sixteen, knowing that she wanted to have such intercourse, would necessarily be an accessory to the crime of the man who subsequently had intercourse with her.[194] Other examples may be cited: the publican who sells alcohol to a person whom he knows to be intending to drive;[195] the shopkeeper who sells a screwdriver to a man who has a notorious local reputation as a burglar; or the taxi-driver who is hired by that same man to drive him to an unoccupied house in the middle of the night.[196]

2.64 We consider in paragraphs 4.113-4.116 below what the policy of the law should be in relation to such cases. Here, we are concerned with eliciting whether the present law solves that problem by requiring the accessory to have assistance of the principal offender as his purpose. Some of the discussion of this issue has been obscured by what we have to say is unhelpful debate over the implications of the word "intention" as used in judicial statements requiring intent to aid or assist on the part of the accessory;[197] and by obscurity as to what in this context is meant by the word "purpose". However, it would seem that no distinctive element is added to the accepted minimum statement of the law, as set out in paragraphs 2.55-2.56 above, unless the accessory's purpose is taken to mean that he acts with the aim and object of bringing about the commission of the principal offence. As Williams points out,[198] it only restates the traditional law to talk of an accessory's purpose that relates

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[193] The extensive academic analysis of the subject is referred to in n. 11 to paragraph 1.9 above. In this paper we seek to state, as briefly as possible, the effect of the authorities.

[194] See paragraph 2.61 above. "On a pure 'knowledge' approach to accessorial mens rea, the argument for liability [in *Gillick*] is unanswerable": Professor Ian Dennis in *Essays in Honour of JC Smith"* (ed. Smith, 1987), at p. 53.

[195] *KJM Smith*, p. 151, n.41.

[196] The Model Penal Code, section 2.06(3)(a), indeed requires an accomplice to act "with the purpose of promoting or facilitating the commission of the offense". The 1985 commentary on the MPC, at p. 316, gives examples of conduct that, under the MPC test, would *not* give rise to accessory liability: "A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit." *KJM Smith*, citing this passage, comments, at p. 142, n.6, that "Under existing English law-in so far as it can be confidently stated-each example has the potential to form the basis of complicity".

[197] Cf. paragraph 2.50 above.

[198] [1990] Crim LR at p.17.

not to the commission of the crime but to the doing of the act of help.[199] We therefore have to ask whether, as authorities in other jurisdictions require,[200] the accessory must act with the aim and object of bringing about the commission of the principal offence.

2.65 For the law of England and Wales, that question can in fact be answered comparatively shortly. The judgment of Devlin J in *NCB* v. *Gamble*[201] has been much criticised,[202] and much interpreted,[203] but under the present law it is impossible to escape from his conclusion that

> "an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive."[204]

It is to be noted that counsel for the Coal Board had specifically argued that in addition to knowledge on the part of the accessory there must be proved "a purpose or motive of the defendant to further the crime or encourage the criminal."[205] That contention was rejected not only by Devlin J, in the passage just cited, but also in the other majority judgment, of

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[199] Similar ambiguity can be found even in the most forceful statements of the "purpose" doctrine. Thus, as indicated in n. 200 below, the need for a common purpose between accessory and principal is stressed by Gibbs CJ in *Giorgianni* (1985) 156 CLR 473. But Gibbs CJ cites in support of that approach, at p. 481, the statement of Woolf J in *A-G* v. *Able* [1984] QB 795 at p. 809E that the accessory must have "approved or assented to" the commission of the principal crime. However, D can "assent" to the commission of a crime by P without the commission of that crime being D's purpose in acting as he did. The shopkeeper who sells the screwdriver to the suspected burglar may well agree with, or at least regard with perfect equanimity, his customer's intention to use the screwdriver for burglary, but at the same time feel that his purpose in making the sale is not in any way frustrated if the burglary in the event does not take place.

[200] The accessory must be "linked in purpose with the person actually committing the crime": Gibbs CJ in *Giorgianni* (1985) 156 CLR 473 at p. 480; though, as explained in paragraph 3.4 of Part 1 of the Appendix to this Paper, the other judges in that case were much less explicit on the point. "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome": Learned Hand J in *US* v. *Falcone* 109 F (2d) 579 (1940). This approach was, following the Model Penal Code formulation referred to in n. 196 above, adopted in the statutory law of many states in the USA.

[201] [1959] 1 QB at pp. 20-25. For the facts of the case see paragraph 2.32 above.

[202] Most strikingly by Williams, [1990] Crim LR at p. 15.

[203] The most detailed analyses are by Dennis, *op. cit.* in n. 194 above, at p. 52, and Sullivan [1988] Crim LR 643-645.

[204] [1959] 1 QB 11, at p. 23.

[205] *Ibid.*, at p. 22.

Lord Goddard CJ, who relied[206] on the judgments in *Ackroyds Air Travel v DPP*[207] for the proposition that knowledge of the circumstances constituting the offence sufficed for conviction.

2.66 Other weighty statements support that approach. In *DPP for Northern Ireland v Lynch*[208] Lord Morris was of the opinion that

> "if...the car was driven towards the garage in pursuance of a murderous plan and...the appellant knew that that was the plan and intentionally drove the car in execution of that plan he could be held to have aided and abetted even though he regretted the plan or indeed was horrified by it. However great his reluctance he would have intended to aid and abet."[209]

Lord Simon of Glaisdale, in the same case, relied on the judgments of Lord Goddard CJ and Devlin J in *NCB v Gamble* to refute the suggestion that an accessory must have as his "motive" (meaning thereby his purpose) the commission of the principal crime;[210] and in *DPP v Maxwell*[211] Lowry LCJ, in a judgment in the Northern Ireland Court of Criminal Appeal that was subsequently much praised in the House of Lords,[212] cited Devlin J's judgment in *NCB v Gamble* for the proposition that "the mens rea required [for complicity] goes to intent only and does not depend on desire or motive".[213]

2.67 None of these statements has, technically, the status of binding authority at House of Lords or, even, Court of Appeal level; but in the face of them it is impossible to prefer, as a guide to the present state of the law, the one or two earlier cases[214] that might be interpreted[215] as requiring purpose rather than mere knowledge on the part of an accessory. However, in none of these cases did the courts specifically consider whether acts done with a passive or even reluctant attitude to law-breaking on the part of others should be made criminal by a very wide rubric that imposes liability for aiding and abetting on the basis of the accessory's knowledge alone. In *Gamble* the Coal Board called no evidence because they wished to create a case as strong as possible against themselves in order to establish that in

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206 *Ibid.*, at p. 18.

207 [1950] 1 All ER 933 at p. 936.

208 [1975] AC 653.

209 Ibid., at p. 678.

210 See the citations and commentary at n. 181 above.

211 [1978] 1 WLR 1350.

212 See e.g., Lord Scarman, *ibid.*, at p. 1362H; and Lord Edmund-Davies, *ibid.*, at p. 1359E.

213 [1978] 1 WLR at p. 1371C.

214 Most notably *Fretwell* (1862) Le & Ca 161.

215 See the discussion by Dennis, *op. cit.*, in n. 194 above, at p. 52.

no circumstances were they, rather than the carrier, responsible for overloaded lorries leaving their premises;[216] not unsurprisingly, they did not succeed. In *Lynch* and *Maxwell* the cases involved terrorist activities that, although they raised important issues of principle on other points,[217] were hardly a fruitful context for arguing that a person who merely knowingly assists the principal offender should himself be subject to no sort of criminal sanction.

2.68 In *Gillick*,[218] however, these issues were, or should have been, more obvious. In particular, the observations of Lord Scarman quoted in paragraph 2.61 above, and his Lordship's adoption of the judgment at first instance of Woolf J, indicate a strong reluctance to allow the general rules of accessoryship to make criminals out of doctors faced with the difficult professional problems envisaged in that case. It has been argued that that aspect of the case, or at least the judgment of Lord Scarman, has to be explained as requiring consideration of the accessory's purpose, in the sense of the result that he acted in order to bring about.[219] We cannot agree. Although the House of Lords was not precluded by previous authority from imposing such a requirement, in the light of the cases just cited that would have been a significant step, and certainly not one that the House would have felt able to take without an express and detailed explanation of its reasoning. In fact, however, there was no such reasoning, and (we have to say) no indication that the substance of the law of accessoryship had been given any detailed consideration.

2.69 *Gillick* has certainly raised important questions about the scope and purpose of the law of accessoryship, questions that under the common law remain unresolved. For the reasons indicated in the last paragraph, the case does not alter the existing law on the basic mens rea for aiding and abetting, which is set out in paragraphs 2.55-2.56 above. It may however give support to either a specific defence, in the case of aiding and abetting, of good motive;[220] or to the application, on the particular facts of *Gillick* itself, of a more general defence of necessity.[221] That these steps were seen as potentially necessary, on the facts of *Gillick*, to mitigate the application of the general law of mens rea in accessoryship is of course a strong reason for looking critically at that law: which we do in Parts III and IV below.

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[216] [1959] 1 QB at p. 25.

[217] In *Lynch's case*, whether duress is a defence to a charge of aiding and abetting murder, on which see *Gotts* [1992] 2 WLR 284; in *Maxwell's case*, the detail of knowledge or foresight that the accessory must have of the principal crime, on which see paragraphs 2.70ff below.

[218] For the facts of the case see paragraph 2.60 above.

[219] Dennis, *op. cit.* in n. 194 above, at pp. 52-54.

[220] See paragraphs 2.59-2.62 above.

[221] See JC Smith [1986] Crim LR at pp. 117-118. This is of course confessedly a rationalisation. There was no mention of such a doctrine either in the speeches in the House of Lords or in the arguments addressed to it.

The accessory's knowledge of the principal crime

2.70 The requirement that an accessory must "know the essential matters which constitute" the principal crime,[222] has given rise to some difficult and complicated law,[223] when it is added to the rule that the principal crime must be one that is actually committed.[224] The problem arises not in the case of an accessory who assists while the principal crime is actually in the course of being committed, but in respect of one who before the commission of the crime conspires to commit it, advises its commission or knowingly gives assistance to one of its principals.[225] Since knowledge can only be of present facts,[226] this element in such an accessory's mens rea can only accurately be expressed in terms of knowledge of the principal offender's intentions; but cases may arise where D provides assistance or equipment knowing, or believing, that P intends crime *x*, when in the event P uses that very same equipment to commit crime *y*. In that case D has indeed assisted P to commit a crime, and the social undesirability of D's conduct may be thought not to be lessened by the fact that the crime actually committed was crime *y* and not crime *x*.[227] There is, however, difficulty in seeing how D can be said to have had knowledge either of P's intentions or of the essential matters constituting the crime that was actually committed by P: the commission of which crime is, under the basic principles of the present law of aiding and abetting, essential to D's liability.

2.71 These difficulties came to a head in *Bainbridge*.[228] The accused's story was that he thought that the person for whom he bought oxy-acetylene equipment was going to use it for cutting up stolen property, and did not know that it was going to be used, as in fact it was, to break into the Midland Bank at Stoke Newington. His counsel argued that since Bainbridge had no knowledge of the details of the principal crime intended, he did not have the *mens rea* of an accessory in that crime. The court held this formulation to be far too narrow. It was enough that the accused knew (and not that he merely suspected) that a crime of the same type as that actually committed was intended by his principal.

2.72 This *Bainbridge* rule has been seen as troublesome in two, contrasting, ways. It is too narrow, in that the requirement of knowledge, taken literally, would exculpate a man who, because of his suspicions, was in effect reckless as to whether the principal crime was intended by his principal. At the same time, however, in the context of a law that convicts

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222 *Johnson* v. *Youden* [1950] 1 KB 544 at p. 546, cited in paragraph 2.56 above.

223 *Smith & Hogan*, pp. 139-143; *KJM Smith* pp. 161-185.

224 See paragraphs 2.35-2.37 above.

225 [1978] 1 WLR 1350, at p. 1371B, per Lowry LCJ.

226 See paragraph 2.53 above.

227 "Where the accomplice has only offence A in contemplation and the principal commits offence B...the accomplice, although morally culpable (and perhaps guilty of conspiring to commit offence A),is not guilty of aiding and abetting offence B.": [1978] 1 WLR 1350, at p. 1375H, per Lowry LCJ.

228 [1960] 1 QB 129.

the accessory for involvement in the actually committed principal offence, it appears to be uncomfortably wide, in requiring a mental attitude only as to a crime of the same "type" as the principal crime. This formulation opens the way to convicting a man as an accessory to crime *x* who does not even suspect the possibility of crime *x* being committed. The court in *Bainbridge* probably meant to say no more than that to be an accessory to an offence of burglary the accused must have known that *some* burglary, but not necessarily *this* burglary, was intended. That in itself divagates from the principle of expressing the accessory's *mens rea* in terms of the specific crime committed by the principal; but the vagueness of the word "type" left open the possibility that the case went even further, by for instance rendering an accomplice who foresaw blackmail guilty of complicity in an unforeseen, but in terms of types of crime similar, robbery.

2.73 In *D.P.P.* v. *Maxwell*[229] M, a member of a Northern Ireland para-military organisation, was asked to drive his car to the vicinity of a public-house, guiding there another car travelling behind him. He assumed that the occupants of the second car intended a "job", or para-military operation; and on arrival at their destination, but after M had driven away, they indeed threw a bomb into the public-house. M was convicted as an accessory to the two crimes committed by the occupants of the car, namely doing an act with intent to cause an explosion and possessing an explosive substance with intent to endanger life or cause serious injury to property, contrary to sections 3 *(a)* and *(b)* of the Explosive Substances Act 1883. M argued on appeal that *Bainbridge* "should be confined to the type of case where the accused knows that an attack by means of explosives is intended but perhaps does not know the target or the precise date of the intended operation".[230] Since, therefore, M did not know the form of terrorism intended by those whom he aided, and did not know that they had a bomb in their car, he could not have the *mens rea* of complicity in the particular terrorist crime that they in fact committed. The whole House rejected this argument, which Lord Hailsham not unreasonably described as wholly devoid of substantial merits.[231] In doing so, the House purported to approve *Bainbridge*. However, the test proposed in *Maxwell* in fact differs significantly from that adopted in the earlier case. The *Maxwell* test is whether the crime actually committed was one that the accused had in contemplation, either in actual detail, or as an obvious possibility amongst various offences likely to be committed by the people to whom he gave assistance.[232] On the facts of *Maxwell* it was easy to apply this test to say that M must have known that one of a limited number of terrorist acts at or near the public-house was intended, and that the crime actually committed fell within the limits of possibility foreseen by him. The accused was in effect presented with a limited "shopping

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[229] [1978] 1 WLR 1350.

[230] *Ibid.*, at p. 1373D.

[231] *Ibid.*, at p. 1359C.

[232] See *per* Viscount Dilhorne at p. 1356F-G; and in particular *per* Lowry LCJ, *ibid.*, at p. 1375A, whose important judgment in the Court of Criminal Appeal of Northern Ireland was specifically approved in the House of Lords by Lords Edmund-Davies, Fraser of Tullybelton and Scarman. Lowry LCJ's formulation of the test was that the complicitor is guilty if "he knows that the principal is committing or about to commit one of a number of specified illegal acts"; and emphasis was placed by both Lord Scarman and Viscount Dilhorne on the fact that the new test, in contrast to *Bainbridge*, expresses the accused's guilt in terms of foresight of the crime actually committed.

list" of specific crimes,[233] all of which, if committed, would occur within foreseen limits of time and space.

2.74 A number of significant issues are left unresolved by these cases. First, despite the differences between the approach in *Bainbridge* and that adopted, on the particular facts, in *Maxwell*, the latter case is authority that *Bainbridge* remains the law. It is however unclear what the limits are of the rule in that case that it is enough that the offence committed is of the same "type" as that contemplated by the accessory.[234] In the Draft Code we sought to express the law by providing that, save where the principal crime is contemplated as being committed only in respect of a specified person or thing

> "a person may be guilty of an offence as an accessory although he does not foresee, or is not aware of, a circumstance of the offence which is not an element of it (for example, the identity of the victim or the time or place of it commission, where this is not an element of the offence)".[235]

Bainbridge certainly goes as far as that, but it may go further in directions that are not clear. Thus, as is pointed out in *Smith & Hogan*,[236] the question still remains after *Maxwell* whether D may be an accessory to P's blackmail committed with assistance thought by D to be directed to a robbery; or to P's taking a motor vehicle without authority committed with assistance thought by D to be directed at theft.

2.75 Second, it is not certain what the effect of *Bainbridge* and *Maxwell* is on the issue of the extent, if any, of the accessory liability of D if he gives advice or information to P about how to commit a crime of a particular type, but without having any particular offence in mind, and P then uses that information in committing such an offence, possibly many months later.[237] That case would seem to fall within even the more limited *Bainbridge* rule, as incorporated in the Draft Code.[238] However, if the requirement stated in *Maxwell* of "whether the crime actually committed is fairly described as the crime or one of a number of crimes within the contemplation of the accomplice"[239] is intended to apply generally, then the law would appear to have been altered. To contemplate "the crime actually committed"

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[233] For this analysis of *Maxwell* see Lord Hailsham [1978] 1 WLR 1350, at p. 1358H-1359A; Lord Fraser, *ibid.*, at p. 1361F; Lord Scarman, *ibid.*, at p. 1362G; and Lowry LCJ, *ibid.*, at p. 1374F.

[234] See paragraph 2.71 above.

[235] Draft Code, clause 27(4).

[236] At p. 140.

[237] This is not a hypothetical issue. In *Baker* (1909) 28 NZLR 536 D was held to be party to a safebreaking when he wrote a letter describing safebreaking techniques in general terms; and in *Invicta Plastics v Clare* [1976] RTR 251 a conviction was obtained for *incitement* when the accused marketed devices designed to enable offences to be committed against the Wireless Telegraphy Act 1949. The implications of the latter case, and of the present problem for the law of incitement, are discussed further in paragraphs 2.130-2.131 below.

[238] See n. 235 above.

[239] [1978] 1 WLR 1350, at p. 1375C.

the accomplice must contemplate his principal acting at the time and at the place and in the manner in which he in fact acted in committing that principal crime: something that is impossible if all that is provided is general advice.

2.76 Third, we have already pointed to the uncertainty in the present law as to the degree of confidence with which an accessory must contemplate the commission of the principal crime, in those cases where his act of assistance takes place before rather than during the commission of that crime.[240] The uncertainties of the test adopted in *Bainbridge* that we pointed to in paragraph 2.72 above, which on this point are not resolved by *Maxwell*, only add to the obscurity of the present law on that point.

2.77 There is little doubt that attempts to accommodate problems of the type envisaged by *Bainbridge* place serious strains on the orthodox rules of aiding and abetting. We consider in paragraphs 3.22-3.23 and Part IV below whether that suggests that those rules should be revised.

2.78 The difficulties posed by the *Bainbridge* type of case do not of course arise if it is clear that D has counselled or procured P to commit one particular crime *and that crime alone*. As Smith & Hogan put it:

> "If D aids, abets, counsels or procures P to commit a crime against a particular person, or in respect of a particular thing, D is not liable if P intentionally commits an offence of the same type against some other person or in respect of some other thing."[241]

The application of this principle is, however, comparatively limited.

2.79 First, the relationship of this principle to the principle enunciated in *Bainbridge* has not been fully worked out. Because of the uncertain width of *Bainbridge*, the present principle appears to be limited to cases where D in effect excludes from his instructions or abetment anything other than the very offence expressly envisaged between himself and P,[242] *and* P intentionally and not merely accidentally deviates from the details of that offence;[243] otherwise, it is all too easy to say, applying *Bainbridge*, that what P did was of the same "type" as was envisaged between himself and D. Second, even when the present principle potentially operates, reluctance to see escape an abettor who specifically encouraged or ordered *some* criminal conduct on the part of the principal, even if not that which in the event occurred, has led to the development of a long-standing rule that the principle only applies if "the act done varies in substance from that which was commanded."[244] The need

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[240] See paragraphs 2.57-2.58 above.

[241] *Smith & Hogan*, p. 139.

[242] See *KJM Smith*, p. 207.

[243] *Ibid.*, p.198.

[244] Hawkins, 2 PC c 29, s 41.

to adjudicate on the "substance" of what was ordered and of what was done has led to some abstruse, indeed impenetrable, issues in theory and, occasionally, in practice.[245] These complications may be thought to be yet another difficulty caused by attempts to impose criminal sanctions on anti-social behaviour by methods that have to circumvent the rule that limits accessory liability to cases where the crime abetted has actually been committed.

Exceptions from, and defences to, accessory liability

Introduction

2.80 The complex, and uncertain, nature of the law of aiding and abetting makes it even more difficult here than in the case of substantive offences to be certain whether rules that do or may prevent the imposition of accessory liability in particular cases create "defences" to such liability; or rather, as part of the basic definition of accessory liability, prevent such liability from even *prima facie* arising.

2.81 That is why we have already been obliged to discuss, and have not reserved for treatment in this section, the issue of "good motive":[246] which might alternatively be regarded as a defence to a charge of accessory liability, or as indicating "a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting".[247] Somewhat similarly, the argument that one is not or should not be subject to accessory liability through assisting the principal simply by performing an existing legal duty, for instance the return of the jemmy to the burglar in *Lomas*,[248] may be an instance of an (alleged) defence, as we treated it in clause 27(6)(c) of the Draft Code; or, as we treated it in paragraphs 2.31-2.34 above, an element in the definition of the actus reus of aiding and abetting.

2.82 In this section we review other special cases where accessory liability may not attach, and which are more clearly identifiable as matters of "defence". The cases are conveniently summarised in clauses 27(6)-(8) of the Draft Code. It will be noted that, in a number of instances, there is substantial uncertainty as to whether, or to what extent, the present common law permits an exemption from liability.

Exemption for protected persons

2.83 We expressed this exemption in the Draft Code as follows:

> "Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is a victim of such an offence can be guilty of that offence as an accessory."[249]

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[245] *Smith & Hogan*, pp.139-142; *KJM Smith*, pp. 201-208; Code Report, paragraph 9.31.

[246] Paragraphs 2.59-2.62 above.

[247] Per Lord Scarman, [1986] AC 112, at p. 190F-G.

[248] (1913) Cr App R 220.

[249] Draft Code, clause 27(7).

Here the principle is stated generally, and is not limited to sexual, or any other particular category of, cases. We recognised that such generalisation might well not represent the present law,[250] but rather implemented part of a wider recommendation in Law Commission Working Paper No 43, that went beyond the *victims* of offences to protect any person whose participation the definition of the principal offence made "inevitably incidental" to its commission.[251] We discuss in Part IV below whether such a defence, which is plainly not at present part of the law of accessoryship, should be created. Our concern here is to attempt to elucidate the present limits of the common law.

2.84 That a rule exists which protects at least the victims of crimes from liability for abetting them is asserted in all the authorities.[252] These, however, also stress the sparse authority for such a rule, and the complete uncertainty as to how far it extends. The principle appears in reality to be one of statutory interpretation, that has only been clearly applied in one case, *Tyrrell*,[253] in 1894. It involves identifying a Parliamentary intention that certain parties be exempt from liability, despite their *de facto* aiding, abetting, counselling or procuring of an offence under the statutory provision in question.

2.85 In *Tyrrell* the defendant appealed against conviction as an accomplice to an offence, under section 5 of the Criminal Law Amendment Act 1885, of having unlawful carnal knowledge of a girl between the ages of thirteen and sixteen, that offence having been committed in respect of the defendant herself. Lord Coleridge CJ, delivering the leading judgment, observed that the statute in question had been passed with the purpose of "protecting women and girls against themselves", and concluded:

> ...it is impossible to say that the Act, which is absolutely silent about aiding or abetting,...can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves.

Parliamentary intention was also referred to by Mathew J, who was of the opinion that:

> ...nearly every section [of the Criminal Law Amendment Act 1885] which deal[t] with offences in respect of women and girls would create an offence in the woman or girl. Such a result cannot have been intended by the legislature.

The court in *Tyrrell* thus exempted the defendant from liability on the basis of an implied statutory intention, rather than by reference to a rule peculiar to victims of sexual offences: indeed, the term "victim" is never used in the judgments. However, the case has since been taken as authority for a supposed principle that the victim of a *sexual* offence, even if he or she encourages its commission, is not liable as an accomplice to that offence if he or she is a member of the class of persons for whose protection the statute was passed.

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250 Code Report, paragraph 9.39.

251 Working Paper No 43, pp. 65-69; Code Report, paragraphs 9.39-9.40.

252 E.g. *Smith & Hogan* pp. 155-157.

253 [1894] 1 QB 710.

2.86 The discussion in *Tyrrell* refers extensively to the implications of sexual offences. It can, therefore, be safely assumed that whatever principle is deducible from the case applies to the offences of intercourse with a girl under the age of thirteen,[254] intercourse with a defective,[255] and permitting the use of premises for intercourse with young girls and defectives.[256] The Court of Appeal, in *Whitehouse*,[257] considered the case to apply also to the offence of incest with a girl under the age of sixteen.[258] Professor Williams argues that this case was an incorrect application of *Tyrrell*,[259] since the legal stigmatisation of incest is primarily on moral or eugenic, rather than protectionist grounds.[260] However, as he himself observes, a girl under sixteen is omitted from the class of possible perpetrators of an offence under section 11 of the Sexual Offences Act 1956. Furthermore, Schedule 2 of that Act provides for the possibility of life imprisonment where an offence of incest contrary to section 10 of the Act is committed by a man with a girl under the age of thirteen. A similar offence with a girl of any other age attracts a maximum sentence of seven years' imprisonment. These two factors suggest that the criminalisation of incest in relation to young girls is designed, at least in part, to protect a group who are liable to be sexually imposed upon.

2.87 That such analysis is necessary does, however, show the difficulty of applying the *Tyrrell* principle if it is limited to persons who can be brought under the description of "victims". Such difficulties are also illustrated by a case in which the principle was held inapplicable to the case of a non-pregnant woman who abets the use upon herself of an instrument to procure abortion,[261] although the clear implication of the relevant statutory provision[262] is that such a woman cannot be convicted of *using* the instrument on herself.[263] Professor Williams[264] has recently analysed in detail the inconsistencies between the theory of implied statutory exemption and the rigidity apparently imposed by analysing *Tyrrell* in "victim"-related terms. One example is the offence of living on the

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254 Sexual Offences Act 1956, s. 5.

255 Sexual Offences Act 1956, s. 7, as amended.

256 Sexual Offences Act 1956, ss. 25-27.

257 [1977] QB 868.

258 Sexual Offences Act 1956, s. 11.

259 "*Victims and other exempt parties in crime*", (1990) 10 LS 245.

260 *Ibid.*, at p. 250.

261 *Sockett* (1908) 1 Cr App R 101.

262 Offences against the Person Act 1861, s. 58.

263 See *Smith & Hogan*, p. 156; and Williams, *Textbook of Criminal Law* (2nd ed., 1983) p. 366.

264 (1990) 10 LS 245.

earnings of prostitution.[265] Until relatively recently, there was no decision on the point, but in *Congdon*[266] it was held that a prostitute could not be convicted of abetting her husband in living on her immoral earnings. Judge Michael Addison considered the case appropriate for the application of the *Tyrrell* "principle", as the relevant statutory provision was intended, at least in part, to protect prostitutes from exploitation by unscrupulous pimps. However, as Professor Williams notes,[267] a further motivation behind the section is to prevent men amassing illicit fortunes through the organisation of prostitution. This latter reason might suggest that the woman ought to be regarded as an accomplice. However, it is the general policy of the statutory provisions not to punish the prostitute herself,[268] but rather to direct itself against those who help her in her trade or live, as above, parasitically on her earnings. Thus, it is a general legislative policy, rather than narrow characterisation of the prostitute as a "victim", that exempts her from liability as an accessory in this type of case.

2.88 The "*Tyrrell*" rule is thus of uncertain content, and uncertain effect. The lack of proper authority for the terms in which it is conventionally described has led to elaborate dispute, both in cases and commentaries, as to its application, and justification. It will therefore be reviewed, from the point of view of law reform, in paragraphs 4.101-4.105 and paragraph 4.167 below.

Law enforcement

2.89 In clause 27(6)(a) of the Draft Code we provided that a person should not be guilty of an offence as an accessory by reason of anything that he does with the purpose of preventing the commission of an offence. We cited as an example a police informer or undercover agent who takes part in a burglary to an extent that makes him an accessory to it, but only in order to be able to be in a position to alert the police in order to prevent the commission of the burglary itself. If his plans succeed, no principal offence will be committed, and thus no question of accessory liability will arise.[269] If, however, his plan miscarries, and the burglary is committed, he would appear to need the protection of a defence such as that provided by clause 27(6)(a) of the Draft Code if he is not to be guilty as an accessory.

2.90 We indicated[270] that this provision in the Draft Code was based on proposition 7(1), illustration (f), of Working Paper No 43. That proposition was, however, formulated in the context of a proposal or assumption that the mens rea of accessory liability included that the

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[265] Contrary to s. 30 of the Sexual Offences Act 1956.

[266] (1990) 140 NLJ 1221.

[267] *Op. cit.*, at p. 249.

[268] *Ibid.*, at pp. 248-249.

[269] See paragraphs 2.35-2.37 above.

[270] Code Report, paragraph 9.33.

accessory "intends that the offence be committed".[271] That requirement is not fulfilled in the case of, for instance, the police agent mentioned in paragraph 2.89 above, and therefore his exemption from accessory liability would have followed from the fact that he lacked the basic mens rea necessary for liability,[272] and not because of any special "defence" of law enforcement. However, so far as the present law is concerned, it is very doubtful whether it is a necessary element to establish the general liability of an accessory that he should "intend"[273] that the principal offence be committed.[274] The reasoning adopted in Working Paper No 43 does not, therefore, establish that a defence based on an intention to prevent the commission of the principal offence is already part of the current law.

2.91 Whether such a defence nonetheless exists does not appear to be discussed in terms in any of the authorities. The point is confused by the possible concurrent existence of a further defence, formulated in clause 27(6)(b) of the Draft Code,[275] that turns not on intended *prevention* of the principal offence, but on reduction of the harmful consequences of the offence once committed. That latter possible defence has been principally considered from the point of its relation to the policy of the law with regard to entrapment;[276] but that issue cannot arise in the present context, since if D's object is to *prevent* P from committing a crime he can hardly be said to be guilty of entrapment if P nonetheless commits a crime against D's will. The most that we think can be said is that if there is a defence based on the accessory's intention to limit the harmful effects of the principal crime once committed, it should follow *a fortiori* that there is a defence based on the accessory's intention to prevent the commission of the principal crime at all. We therefore turn to consider whether there is indeed in the present law a defence, along the lines of clause 27(6)(b) of the Draft Code, available to those whose accessory conduct was aimed at limiting or avoiding the harmful consequences of the principal offence.

Purpose of limiting harmful consequences

2.92 In the Code Report[277] we indicated that the Draft Code statement of this defence is similarly based on proposition 7 in Working Paper No 43. However, that consideration cannot be dispositive, because of the doubt as to whether proposition 7 reflects the present

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[271] Working Paper No 43, p. 48.

[272] *Ibid.*, p. 51.

[273] I.e. have as his purpose, the term that we deliberately used to express the law enforcement defence in clause 27(6)(a) of the Draft Code.

[274] See paragraphs 2.63-2.69 above.

[275] Where the accessory acts "with the purpose of avoiding or limiting any harmful consequences of the offence and without the purpose of furthering its commission". This defence is discussed in paragraphs 2.92ff below.

[276] See paragraph 2.93 below.

[277] Paragraph 9.33.

law.[278] We also suggested that support could be found in *Gillick*, where the conclusion that the conduct of a doctor giving responsible clinical advice was necessarily "innocent"[279] should be seen as an example of a more general category of accessory acts done for the sole purpose of containing the harm done by the principal.[280]

2.93 This broad statement of principle goes wider than the particular case of a police agent or informer who instigates an offence, or assists in its commission. It is now clear that such "entrapment" provides no defence to the principal offender,[281] but the effect of such conduct on the accessory liability of the entrapper remains obscure.[282] It seems likely, however, that, following the policy guidance given to police officers by Lord Parker CJ in *Birtles*,[283] there can be no question of a defence to accessory liability if the police officer or informer follows the disapproved course of instigating the commission of the principal offence.[284] However, Lord Parker also indicated that where an offence "is already laid on...the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so."[285]

2.94 These observations were picked up in *Clarke*,[286] where the defendant's case, on a charge of abetting burglary, was that he had joined in an already "laid on" burglary solely to assist the police and limit the loss. The Court of Appeal (Criminal Division) recognised that the basic rule was that motive was irrelevant once intention to assist and full knowledge were established,[287] but said that it was

> "quite another thing to conclude (if a jury accepts evidence to this effect) that conduct which is overall calculated and intended not to further but to frustrate the ultimate result of the crime is always immaterial and irrelevant."[288]

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[278] See paragraph 2.90 above.

[279] See paragraphs 2.60-2.62 above.

[280] Code Report, paragraph 9.35.

[281] *Sang* [1980] AC 402.

[282] *Smith & Hogan*, pp.157-159.

[283] [1969] 1 WLR 1047 at p. 1049G-H.

[284] See per Lord Salmon in *Sang* [1980] AC 402, at p. 443F-H.

[285] [1969] 1 WLR at p. 1049H.

[286] (1984) 80 Cr App R 344.

[287] Citing *Gamble* and *Lynch*: see paragraphs 2.65-2.66 above.

[288] (1984) 80 Cr App R at pp. 347-348.

The court emphasised that such claims would only rarely arise; but the case is authority that a defence along the lines set out in clause 27(6)(b) of the Draft Code is envisaged in the present law. Whether the defence can be generalised to the extent that the Draft Code provides depends on what implied rationalisation can be drawn from the enigmatic remarks of some of the judges in *Gillick*;[289] and the desirability, limitations and proper statutory formulation of such a defence are matters that we take up when considering reform of the law in paragraphs 4.123-4.131 below.

Withdrawal[290]

2.95 Although there is no doubt that some sort of a defence of withdrawal exists, its terms and limitations are controversial. In the Draft Code we did not feel able to state the defence more widely than to limit it to those who *encourage* the commission of a crime (as opposed to accessories generally), but before its commission either countermand their encouragement or take all reasonable steps to prevent it being committed.[291] In the following paragraphs we briefly comment on that statement of the present law.

2.96 It is of course a general principle of the law that once an offence is committed, nothing the offender may afterwards do can affect his liability: evidence of repentance or attempts to minimise the social harm caused by his conduct can only have a bearing on sentence. However, since accessorial liability is derivative in nature, and does not crystallise until the primary offence has been committed, there is a period of time between the acts of assistance or encouragement and the commission of the principal offence during which the accessory can take steps to withdraw. It could be said that once the accessory has encouraged or helped, no change of mind can alter the facts: he is no different from a principal who commits the crime and then claiming he should not be convicted because he has repented. However, considerations of social policy have lent credence to the counter-argument that if an accessory counters his assistance with equally obstructive measures, he should be acquitted because of his efforts to right the wrong.

2.97 For that reason, the law has for centuries recognised that an accomplice, in at least some circumstances, may escape liability for the final offence by withdrawal before the crime is committed. As early as 1576 Plowden stated in his commentary on *Saunders and Archer*:[292]

> "If I command one to kill JS and before the fact done I go to him and tell him that I have repented and expressly charge him not to kill JS and he afterwards kills him,

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[289] It will be recalled that other competing rationalisations of these remarks include recognition of a defence of good motive (paragraphs 2.59-2.62 above); recognition of a requirement that the accessory should have the commission of the principal crime as his purpose (paragraphs 2.63-2.69 above); and an unexpressed appeal to the defence of necessity (JC Smith, [1986] Crim LR at pp. 117-118).

[290] *Smith & Hogan*, pp. 153-155; *KJM Smith*, pp. 251-262.

[291] Draft Code, clause 27(8); Code Report, paragraphs 9.41-9.42.

[292] (1576) 2 Plowd 473, at p. 476.

there I shall not be accessory to this murder, because I have countermanded my first command, which in all reason shall discharge me ... but if he had killed JS before the time of my discharge or countermand given, I should have been accessory to the death, notwithstanding my private repentance."

Repentance without action is insufficient because, although the accessory will have an "innocent" mind at the time of the crime, he will have had the relevant *mens rea* when he assisted or encouraged the principal: and it is on this conduct that his liability is founded.

2.98 Withdrawal, then, must manifest itself in some overt action and must be voluntary.[293] As long as the withdrawal is voluntary, the courts are reluctant to investigate the motive behind it. An effective withdrawal must:

> "serve unequivocal notice on the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw."[294]

Therefore, what is an effective withdrawal may depend on the type of participation of the accessory in the contemplated offence. If the accessory has only encouraged or advised the principal it is enough for him to tell the principal to desist in unequivocal terms.[295]

2.99 It was suggested in *Croft*[296] that all countermands must be express, but it is submitted that it is enough that the communication gives the principal unequivocal notice as required by *Whitehouse*.[297] A good deal more may be required where the accessory has supplied the means for committing the crime,[298] as was illustrated in *Becerra*.[299] It seems then that the degree and type of assistance rendered by the accessory, together with the proximity in time to the commission of the offence, will have a bearing on what will constitute an effective withdrawal. Thus in *Grundy*[300] the accessory had aided the principal by supplying him with information concerning a burglary, but substantial attempts to stop the

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[293] *Smith & Hogan*, p. 155.

[294] *Whitehouse* [1941] 1 WWR 112, per Sloan JA (Court of Appeal of British Columbia), approved in *Becerra* (1976) 62 Cr App R 212.

[295] *Saunders and Archer* (1576) 2 Plowd 473.

[296] [1944] 1 KB 295.

[297] Lanham (1981), 97 LQR 575, at p. 588.

[298] It was the uncertainty of the law in this respect that compelled the cautious statement of the defence in the Draft Code: see paragraph 2.95 above.

[299] (1976) 62 Cr App R 212. In that case, D handed P a knife so that he could use it on anyone interfering in their burglary. D did not make a sufficient communication of withdrawal when, disturbed by a landlord, he said, "Come on, let's go", and escaped through a window. Something "vastly different and vastly more effective" was required, (*per* Roskill LJ at p. 219).

[300] [1977] Crim LR 543. See also *Whitefield* (1984) 79 Cr App R 36.

principal breaking-in during the fortnight leading up to the offence were sufficient evidence of a valid withdrawal to have been left to the jury. As Smith and Hogan state:

> "It may be that an effective withdrawal can be made more easily at the preparatory stage than where the crime is in the course of commission, as in *Becerra*. When the knife is about to descend, the only effective withdrawal may be physical intervention to prevent it reaching its target."[301]

2.100 It may seem a matter of commonsense that if the accessory has counselled more than one person, he must communicate his countermand to each principal in order to escape liability;[302] but a counterview might be that communication even to one person could be a sufficient earnest of the accessory's desire to withdraw. In any case where the accessory does succeed in raising the defence of withdrawal that cannot affect any liability he may have already incurred for the inchoate offences of incitement, conspiracy, or attempt to commit the crime.[303]

2.101 If the withdrawal is effective, in the sense that it prevents the commission of the principal offence, accessory liability cannot in any event arise, and the present issue becomes irrelevant. Where the accessory has tried but failed to prevent the commission of the principal offence, the extent to which those efforts should provide a defence, as opposed to grounds of mitigation, raises difficult issues of policy and definition: as the foregoing survey of the limited case-law indicates.

Offences that can be aided and abetted

2.102 As pointed out in paragraphs 2.7-2.9 above, under the old law of felonies and misdemeanours liability for aiding and abetting only attached in respect of misdemeanours; secondary liability in the case of felonies was regulated by the law of principal in the second degree and accessory before the fact. The effect of the revision of the law by section 1 of the Criminal Law Act 1967, attendant on the abolition of the distinction between felonies and misdemeanours, is that the law of aiding and abetting, as stated or declared in the 1861 Act, now applies to all substantive offences. This would appear to have been a purely formal alteration, since there is no reason to think that before 1967 the substance of the law of accessory liability differed as between felonies and misdemeanours.

2.103 Authority is sparse on the further question of liability for aiding and abetting inchoate offences.[304] If P, aided or encouraged by D, commits the *actus reus* of an attempt with the

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[301] *Smith & Hogan*, p. 157.

[302] *State* v. *Kinchen* (1910) 52 So 185, quoted by Lanham, *op. cit.*, in n. 297 above, at p. 591.

[303] Thus, where the accessory's participation is in the form of encouragement he will usually still be liable as an inciter. In contrast is the case of the helper who, unless he is part of a conspiracy, will not commit any inchoate offence.

[304] See *KJM Smith*, pp. 53-54, and, in particular, JC Smith in *Crime, Proof and Punishment* (ed. Tapper, 1981), at pp. 22-29.

necessary *mens rea*, then there seems no reason in principle why D should not be guilty of aiding and abetting P's attempt: the necessary precondition of the commission of the principal crime, the attempt, having been fulfilled.[305] Similarly, there seems no reason in principle why, on suitable facts, a person might not be guilty of aiding and abetting incitement, or conspiracy, though perhaps not surprisingly there are no decisions to that effect. In practice, conduct that prima facie suggests the existence of such offences might, on closer inspection, prove to be incitement in its own right, where D encourages X to encourage P to commit a crime.[306] Alternatively, such inspection might establish that D not merely assisted in the conspiracy but was party to the conspiracy itself.[307] It is, however, possible to envisage cases where D assists conspirators without conspiring with them: for instance if, knowing that A, B and C wish to meet in order to rig the stock market, D makes a meeting room available to them, but takes no part in the actual discussions or in the fraudulent bargain that results.

Secondary Participation in Aiding and Abetting[308]

Preliminary

2.104 The issue here is not, as in paragraph 2.103 above, whether it is possible to be an aider and abetter of incitement, conspiracy or attempt; but whether it is or should be possible in law to incite, attempt or conspire towards an act of aiding and abetting.

2.105 Any analysis of these issues has to take account of the fact that, in the law as it at present stands, "aiding and abetting" is not a separate (inchoate) offence in itself, but only a means of committing the particular offence abetted.[309] Accordingly, contentions that, for instance, one can incite the abetment of crime[310] may fall at the preliminary hurdle that the act incited is in law (no more than one variety of) the commission of a principal crime itself. That conclusion was indeed reached, with unassailable logic, in the Crown Court case of *Bodin*.[311] D made a deal with X under which X was to find a third party (P) to assault Y: that is, X was to procure P to commit the assault. D was charged with inciting X to assault Y. That charge appeared logical because, had the plan been carried through, X would have been guilty of the assault itself, as a secondary party. However, the actual act that X had

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[305] So decided in *Hapgood and Wyatt* (1870) LR 1 CCR 221.

[306] That is because incitement to incite is itself an offence, albeit one that is surrounded by some complex law: see paragraph 2.140 below.

[307] JC Smith, *op. cit.* in n. 304 above, at pp. 28-29.

[308] Both the authorities, such as they are, and the possible relevant principles are surveyed in great detail by JC Smith, *op. cit.* in n. 304 above, at pp. 29-44. The account in the text gives as brief an account as is compatible with making intelligible the law reform treatment that is discussed in paragraphs 4.180-4.187 below.

[309] See e.g. paragraphs 1.11-1.12 above.

[310] See Williams, *Textbook of Criminal Law* (2nd ed, 1983), pp. 443-444.

[311] [1979] Crim LR 176.

been incited to do, find an assaulter, was not a crime in itself, and would become such only when the eventual assault was committed by P; which had not occurred in the present case. D had not therefore in the event incited the commission of any crime.[312]

2.106 These technical complications may well be thought to provide yet another reason for looking again at the rule that aiding and abetting can only take place in respect of a crime that is actually committed. Here, however, they serve only as an important background to any attempt to expound the present law.

Inchoate offences applied to aiding and abetting

2.107 It is now provided by statute that, whatever may have been the position at common law,[313] there is no offence of *attempting* to aid and abet.[314] We have referred in paragraph 2.105 above to the technical difficulties besetting *incitement* to aid and abet. The better view would appear to be that, where the ultimate principal crime is indeed committed,[315] the alleged inciter is guilty of inciting that crime or of nothing at all.[316] A similar objection can be raised in respect of the possibility of a *conspiracy* to aid and abet; only one, very obscure, authority appearing to support the existence of such an offence.[317]

Joint enterprise

Status and development

2.108 We pointed in paragraphs 1.13-1.14 above to the uncertain status of this doctrine, which is also known in the cases and commentaries as the doctrine of common purpose, common design or common pursuit. The uncertainty relates, in particular, to whether the doctrine extends liability to cases that would not be caught by the law of aiding and abetting. For that reason, we deal with it separately from the main discussion of aiding and abetting.

2.109 The doctrine depends on the identification of a common (criminal) enterprise between D and P, in the pursuit of which enterprise P commits a crime that is or may be "collateral" to, that is to say not expressly part of, the agreed or understood objects of the joint enterprise. In this it differs from cases of joint *principalship*, discussed in paragraph 2.6

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[312] See further Code Report, paragraph 13.19. The oddity of this conclusion is underlined by the fact that (subject to the problem of whether incitement can be committed without a defined incitee, an issue that we discuss in paragraph 2.134 below) on the facts of *Bodin* D could probably have been convicted of incitement to *incite*: because the latter crime is committed as soon as the encouragement is issued, and whether or not the principal crime itself is committed. See paragraph 1.12 above, and, further, paragraph 2.126 below.

[313] See e.g. *Davis* [1977] Crim LR 542, discussed by Smith, *loc. cit.* in n. 304 above, at p. 34.

[314] Criminal Attempts Act 1981, sections 1(4)(b) and 6(1).

[315] Cf *Bodin*, cited in paragraph 2.105 above.

[316] Cf. Smith, *op. cit.* in n. 304 above, at pp. 29-32.

[317] *Po Koon-Tai* [1980] HKLR 492, cited by Smith, *op. cit.* in n. 304 above, at pp. 35-36.

above, which are sometimes misleadingly described as cases of joint enterprise. In joint principalship P1 and P2 both fulfil the mental and physical requirements for liability for the principal crime. In joint enterprise D is inculpated in respect of P's crime even though he does not commit its actus reus, and does not possess the mens rea required of a principal. Thus if, during a burglary committed by P and D, P commits murder by intentionally killing the householder, the issue of joint enterprise liability for murder on D's part arises even though he, plainly, did not have the mens rea of the murder committed by P. The difficulties, already mentioned, of the relationship of this doctrine to the orthodox law of accessoryship are increased by the fact that liability based on joint enterprise has mainly been relied on in cases where homicide has been committed in the course of a robbing or burgling expedition. In such cases, the desire to implicate everyone concerned in the homicide may well outrun the more stringent demands of legal analysis.

2.110 In the course of a detailed survey of the history and development of the joint enterprise or common purpose doctrine, Professor KJM Smith[318] points out that it probably originated as an aspect of, or as a doctrine springing from the same motivations as, the old felony-murder rule: "the desire on the part of the old lawyers to render all parties who are jointly engaged in the commission of a felony responsible for deadly violence committed in the course of its execution."[319] However, the confirmation in the law of accessoryship of the requirement on the part of the accessory of knowledge of the elements of the principal crime, including knowledge of the intentions of the principal,[320] together with the disfavour into which doctrines of constructive liability have progressively fallen,[321] led to a definite, though unacknowledged, retreat from any rationalisation based on constructive crime.[322] As a result, it is hardly surprising that, as Professor Smith says, "whatever perceived practical need may have motivated the doctrine's creation, its nature, status, and relationship to general complicity concepts and requirements have been and, to a fair degree, still remain, hazy."[323]

The modern law

2.111 The basis of the doctrine has always been the criminal enterprise on which P and D originally jointly embarked; but the recent emphasis on the subjective basis of accessory liability has led to responsibility for collateral crimes committed in the course of a "joint

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[318] *KJM Smith*, chapter 8.

[319] Pollock CB in *Skeet* (1866) 4 F & F 931, cited in *KJM Smith* at p. 209.

[320] See paragraphs 2.55-2.56 above.

[321] Most notably demonstrated by the abolition of the felony-murder rule itself in the Homicide Act 1957. Dealing with an argument based on constructive liability in a modern common enterprise case, Lord Parker CJ, for a strong Court of Criminal Appeal, said that "It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today": *Anderson and Morris* [1966] 2 QB at p. 120B.

[322] The history is traced, with full references to contemporary commentators, in *KJM Smith*, pp. 210-214.

[323] *KJM Smith*, p. 209.

enterprise" being discussed in terms of what the parties have expressly or tacitly agreed. That approach was adopted by the Court of Criminal Appeal in *Anderson & Morris*.[324] Three points were stressed in the judgment of Lord Parker CJ. First, where two parties embark upon a joint enterprise each is liable for acts done in pursuit of that enterprise, including unusual consequences of the execution of the enterprise. Second, however, if one party goes beyond what has been tacitly agreed, his co-adventurer is not liable for the consequences of that unauthorised act. Third, it is a matter of fact for the jury whether what was done was part of the joint enterprise; or went beyond it and was thus unauthorised.

2.112 On this basis, therefore, the crucial matter for the jury will be whether the incidental offence comes within the scope of the parties' (tacit) agreement; in other words, whether the commission of the incidental offence by one party can be taken to have been at least notionally agreed to and thus in effect authorised by the other. Further support for this approach can be seen in *Davies* v *D.P.P.*,[325] which involved a gang fight on Clapham Common. One gang member (B) carried a knife, with which he inflicted a fatal stab wound. There was no evidence that the defendant had authorised or agreed to B's carrying a knife, and as a result the House of Lords held that the defendant could only be guilty of a common assault, and not as an accomplice to the murder. Similarly, in *Lovesey & Peterson*[326] the judgment focuses on the lack of authorisation by D in respect of P's collateral offence, without considering whether, although not *authorised*, that offence may nonetheless have been foreseen by D, the non-acting party.

2.113 However, the view that joint enterprise liability for collateral acts is based on authorisation or agreement has been difficult to apply consistently once implied or tacit authorisation is admitted as a ground of liability. Recent authorities show, rather, a tendency towards founding liability on *foresight* of the co-adventurer's acts: something that, strictly speaking, can only be *evidence* of actual authorisation. The leading case, which appeared to have clarified the matter, is *Chan Wing-Siu*,[327] a Hong Kong case involving a murder committed in the course of a robbery. The Crown did not seek to uphold the convictions on grounds of orthodox secondary liability. Instead, the Privy Council held in an opinion delivered by Sir Robin Cooke that;

> "The case must depend on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.
>
> That there is such a principle is not in doubt. It turns on contemplation or putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common

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[324] [1966] 2 QB 110, at p. 118.

[325] [1954] AC 378.

[326] [1970] 1 QB 352.

[327] [1985] AC 168.

unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."[328]

2.114 This restatement of joint enterprise doctrine focuses firmly on the foresight of the accomplice, more particularly with the apparent equation of "contemplation" with "authorisation". That led to confusion in later cases, to the extent that the need to decide in favour of either foresight or authorisation became itself obscured. This is well illustrated by the contemporary analysis of the effect of the judgment of the Court of Appeal in *Slack*.[329] Although this judgment refers a number of times to the need for an agreement, it is summarised in the headnote as requiring an "understanding" on the part of the defendant that the collateral crime would take place: a position ambiguous between foresight and authorisation.

2.115 The confusion which thus existed in relation to the mental element in cases of joint enterprise was highlighted in *Wakely, Symonds & Holly*.[330] Three defendants were charged as parties to the murder of an elderly man committed in the course of a burglary. The trial judge directed the jury that even if they had not expressly agreed to use violence, all three would be liable for the violence if they had foreseen a real possibility of it arising if they were disturbed. The Court of Appeal agreed that the judge had misdirected the jury by referring to foreseeability, rather than to the tacit agreement or understanding which was required by *Slack*. Lord Lane CJ however, commented that;

> "on the facts of this particular case the distinction between foresight and tacit agreement is as fine as could possibly be imagined, if indeed a distinction exists at all."[331]

More generally, however, it is quite possible for a person to foresee an act as likely to occur whilst not entering into anything resembling an "agreement" with his co-adventurer that it shall occur.

2.116 The Court of Appeal confronted this problem in *Hyde, Sussex & Collins*.[332] Lord Lane CJ held that his earlier dictum in *Wakely* as to the appropriate direction on the mental element in joint enterprise cases was wrong or, at least, incomplete. He said that in *Wakely* the court had failed to make an adequate distinction between tacit agreement and foresight, and this was, in the view of the present court, inconsistent with the principles laid down by Sir Robin Cooke in *Chan Wing-Siu*. *Hyde, Sussex & Collins* appears to have resolved the confusion over the mental element in joint enterprise cases in favour of foresight alone. As Lord Lane concluded;

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[328] *Ibid.*, at p. 175F.

[329] [1989] QB 775.

[330] [1990] Crim LR 119.

[331] *Ibid.*

[332] [1991] 1 QB 134.

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture."[333]

Thus, on the basis of *Chan Wing-Siu* and *Hyde*, where two parties embark on a joint unlawful enterprise, each is liable for the acts carried out in pursuance of the agreed plan. Additionally, each party will be liable for any further acts which, although they fall outside what was expressly or tacitly agreed, were nevertheless foreseen.[334]

2.117 As to the degree of risk of occurrence of the collateral offence which has to be foreseen by the defendant, before he can be guilty of that offence as a joint enterpriser, Sir Robin Cooke noted in *Chan Wing-Siu*:[335]

> Various formulae have been suggested - including a substantial risk, a real risk, a risk that something might well happen. No one formula is exclusively preferable ....

He went on to say:[336]

> What has to be brought home to the jury is that occasionally a risk may have occurred to an accused's mind - fleetingly or even causing him some deliberation - but may genuinely have been dismissed by him as altogether negligible. If they think there is a reasonable possibility that the case is in that class, taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm.

In *Roberts*,[337] the Court of Appeal effectively considered the second passage above to be unnecessary, and potentially confusing to juries.[338] It stated:[339]

> ... we are doubtful whether the defendant 'B', who fleetingly thinks of the risk of 'A' using violence with murderous intent in the course of a joint enterprise only to dismiss it from his mind and go on to lend himself to the venture, can truly be said, at the

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[333] *Hyde, Sussex & Collins* at p. 139D. This judgment was specifically approved, as correctly stating the outcome of *Chan Wing-Siu*, by the Privy Council in *Hui Chi-Ming* [1992] 1 AC 34, at p. 51B; and by the Court of Appeal in *Roberts* (1992) 142 NLJ 1503.

[334] Actual foresight is required: gross negligence as to the likely acts of one's companion is not enough (*Reid* (1975) 62 Cr App R 109).

[335] [1985] AC 168, at p. 179.

[336] *Ibid.*

[337] (1992) 142 NLJ 1503.

[338] *Ibid.*, at p. 1504.

[339] *Ibid.*

time when he so lends himself, to "foresee" or "realise" that 'A' might commit murder.

2.118 This passage creates some difficulties. It is, with respect, clear that if a possibility has been dismissed from someone's mind, then it is no longer contemplated by him in any sense of that word. The court however emphasised Sir Robin Cooke's requirement of the contemplation of a *real* risk, a requirement that they considered had been assumed by Lord Lane in *Hyde*.[340] That seems to suggest that something more than simple foresight of an offence by the accused's companion is required; rather, the collateral crime must be foreseen as a real, substantial or serious possibility.

Relationship with complicity

2.119 As stated above,[341] joint enterprise was once seen as a distinct body of rules, different from the rules on aiding and abetting, but recent developments have obscured the position. Professor JC Smith points to the statement of Lord Lane CJ in *Slack* that it is sufficient if a person lends himself to the unlawful enterprise with the foresight that the collateral crime may occur, but seeks to justify that formulation in terms appropriate to the law of complicity:

> "By so doing he has given assistance and encouragement to [his co-adventurer] in carrying out an enterprise which he knows may involve [the collateral crime]".[342]

Lord Lane CJ's judgment in *Hyde* drew heavily on this commentary on joint enterprise doctrine and seemed to accept its reasoning fully.[343] However, any attempt to explain the joint enterprise cases in terms of the law of complicity fails on a simple factual basis. Any assumption that a person who lends himself to an enterprise, with foresight of a collateral crime, *necessarily* provides assistance or encouragement in relation to *that* crime, as is required if he is to be liable for aiding and abetting, is simply not correct. Evidence of an agreement between the parties might indeed be the basis of a strong suggestion that they had assisted or, more likely, encouraged each other. However, since the decision in *Hyde* it is clear that no agreement is needed. In addition, the principle in *Hyde* was formulated primarily to deal with circumstances where the crime is "a possibly unwelcome incident of the [enterprise]."[344] In such cases, the notion that one adventurer has necessarily assisted or encouraged the other must be unsupportable.

2.120 In truth, *Hyde* makes the co-adventurer liable on a theory that is separate from and extends beyond the boundaries of secondary liability. It is not necessary under that rule to

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[340] *Ibid.*

[341] See paragraphs 2.108 and 2.110 above.

[342] Commentary on *Wakely, Symonds & Holly* [1990] Crim LR 121.

[343] [1991] 1 QB at p. 139D.

[344] [1991] 1 QB at p. 138E.

establish actual acts of assistance and encouragement: the liability of the non-acting party flows instead from his participation in an unlawful venture coupled with his foresight, or at least contemplation as a real or substantial risk,[345] of the criminal developments which might ensue. The principle formulated in *Hyde* should properly be seen as a simple reiteration of the principle, stated with clarity in *Chan Wing-Siu*,[346] that the ordinary rules of secondary liability do not wholly overlap with joint enterprise cases.

Application to murder

2.121 We have mentioned that common enterprise theories, although stated as rules applying to criminal liability generally, have been most frequently resorted to in practice in cases of murder. Because there are some special features of that crime, the effect of joint enterprise doctrines in cases of murder must be considered separately.

2.122 The combined effect of *Moloney*[347] and *Hancock & Shankland*[348] was that no person could be convicted of murder unless he had an intent to kill or to cause grievous bodily harm, and foresight was not to be equated with that intent. In *Ward*[349] it was argued that this principle that foresight should not be equated with intent should be applied equally when the murder was committed as part of a joint enterprise. However, the Court of Appeal held that the principle that had emerged from the cases of *Moloney* and *Hancock & Shankland* had no effect on what it regarded as the well established doctrine of joint enterprise; and thus a co-adventurer's liability for a collateral act of murder could be based simply on foresight that death or serious personal injury was a possible incident of the planned venture. This view was confirmed, after some doubts, in *Slack*.[350]

2.123 It is therefore now clear that a defendant can be liable for murder solely on the basis of his contemplation of a real and substantial risk[351] that his co-adventurer might intentionally kill or inflict serious personal injury. This standard of liability appears to be extremely broad in two respects. First, it is one thing to think that a person should be guilty of murder if he engages in an unlawful enterprise and foresees that his co-adventurer may

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[345] See paragraph 2.118 above.

[346] [1985] AC 168, at p. 175F-G.

[347] [1985] AC 905.

[348] [1986] AC 455.

[349] (1986) 85 Cr App R 71.

[350] [1989] 1 QB at p. 781F. The Court of Appeal used the language of express or tacit understanding, but that formulation was explained in terms of foresight in *Hyde*.

[351] *Hyde* itself said nothing as to the significance or level of the risk that had to be foreseen. However, as indicated in paragraph 2.118 above, *Roberts* establishes that "foresight", in all cases of joint enterprise liability, has to be of a real and substantial risk. That view was also adopted in *Rook* [1993] 1 WLR 1005; where, however, the Court of Appeal considered that that was also the standard to be applied in identifying the "contemplation" of the principal offence required for liability for aiding in aiding and abetting.

intentionally kill, but rather different to convict such a person of murder when he merely foresees that his co-adventurer may intentionally inflict serious injury.[352] Secondly, it is anomalous that in such a case the law now requires a less blameworthy mental standard for the non-acting co-adventurer than for the person who actually commits the murderous act.

Liability for unforeseen consequences

2.124 Finally, if the principles of joint enterprise make the defendant liable for the collateral act he will also be liable for the unforeseen consequences of that act. A simple application of this principle can be seen in the case of *Baldessare,*[353] where A and B together unlawfully took a car. It was held that A was equally guilty of the offence of manslaughter which was based upon the death of a third party that resulted from B's mode of driving. Similarly, Smith & Hogan suggest that the defendant in *Davies* would have been liable for manslaughter if the fatality had arisen as a result of a blow from the fist.[354] That would be so because the defendant would have clearly foreseen the use of fists, and from that foresight all else followed.

The future of the doctrine

2.125 The question posed for the present exercise is, therefore, whether this distinct doctrine of common enterprise should be retained as an addition to orthodox accessory liability. We review that question in paragraphs 4.198-4.201 below.

INCITEMENT

Introduction

2.126 Unlike aiding and abetting, where the counsellor and procurer of a principal offence is himself a party to that offence,[355] incitement is an inchoate offence in its own right, that consists simply of the act of incitement. As Lord Kenyon famously put it, "it is argued that a mere intent to commit evil is not indictable, without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony?"[356] The main effect of this characteristic of incitement is that, as in the other inchoate crime of conspiracy it is possible to be guilty of incitement even when the offence incited is not in the event committed.[357]

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[352] This problem arises primarily from the anomaly in the substantive law of murder. Despite murder being a crime of intention, a person can be guilty of murder where he only intends to cause grievous bodily harm: Smith, [1991] Crim LR 134.

[353] (1930) 22 Cr App R 70.

[354] *Smith & Hogan*, p. 148.

[355] Code Report, paragraph 9.5; and paragraph 1.11 above.

[356] *Higgins* (1801) 2 East 5, at p. 170.

[357] Cf, in aiding and abetting paragraphs 2.35-2.38 above.

Elements of the offence

2.127 The inchoate nature of incitement makes description of the terms of the offence a simpler task than in the case of aiding and abetting. It is not, in our view, illuminating to seek to analyse this crime into discrete elements of *actus reus* and *mens rea*,[358] since the act of which the crime consists, "incitement", is not, or at least may not be, adequately described as a simple physical act, as opposed to such an act committed with a further end in view. Thus, to quote the well-known definition offered by Lord Denning MR in *Race Relations Board v Applin*,[359] "to 'incite' means to urge or spur on by advice, encouragement and persuasion". Under that rubric, the inciter must not only advise, etc, but must also aim at emboldening the person incited to commit the offence. The extent to which the inciter must seek the commission of the principal offence, and the means whereby he must work on the principal to achieve that end, are the two most difficult issues in the present law of incitement, and must be treated separately.

The knowledge and purpose of the inciter

2.128 As in aiding and abetting, the inciter must know all the circumstances of the act incited that would make it criminal, including the necessary mental element of the principal offender.[360] *Curr*[361] is authority for the view that it is indeed *knowledge* on the part of the inciter that is required, and not merely belief. That requirement led to an acquittal in *Curr* itself, where the accused engaged in the highly objectionable and corrupt[362] practice of trafficking in family allowance vouchers by purchasing them at an undervalue from their holders and then sending an agent to cash them. Since it was not proved that the agent knew that she was not allowed to receive the moneys, as the definition of the offence under section 9(b) of the Family Allowances Act 1945 required, the alleged inciter could not be shown to have known that circumstance of the offence. For this reason he did not fulfil the necessary requirements for inciting it.

2.129 The result in *Curr* has been much criticised, for instance in *Smith & Hogan*,[363] who argue that belief on the inciter's part that the agent had the *mens rea* of the principal crime should suffice to convict him; though even that formulation would not have led to a conviction if Mr Curr had been able to raise sufficient doubt as to whether he might have realised the innocent state of mind of his agents. It is undoubtedly the law that no offence

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[358] Compare the treatment in *Smith & Hogan*, pp. 265-269.

[359] [1973] QB 815 at p. 825. The case concerned the statutory offence of incitement to racial hatred under section 12 of the Race Relations Act 1968, but Lord Denning's observation as to the meaning of "incitement" has been accepted as relevant also to the use of the word in the definition of the common law crime.

[360] *Smith & Hogan*, p. 268.

[361] [1968] 2 QB 944.

[362] [1968] 2 QB at p. 950D.

[363] At p. 269.

need be committed or even intended by the person incited.[364] However, *Curr* reintroduces the effect of such a requirement by including the *mens rea* of the person incited as one of the elements in the principal crime of which the inciter must have knowledge. This irrationality, as such it seems, emboldened the Commission, when preparing the Draft Code, to follow both Law Commission Working Paper No 43[365] and the Code Team[366] in rejecting *Curr* in favour of a rule that would read:

> "A person is guilty of incitement...if he intends *or believes* that the other, if he acts as incited, shall or will [do the acts that involve the commission of the offence] with the fault required for the offence".[367]

That rule is, however, only doubtfully a complete statement of the present law. We therefore have to deal, in Part IV below, with the whole issue of whether intention, knowledge or belief as to the elements of the principal crime is the appropriate state of mind to demand of one who assists or encourages that crime.

2.130 The books are clear, however, that in addition to knowledge of the circumstances and elements of the principal crime, the inciter must have as his purpose the commission of that principal crime:[368] "An intention to bring about the criminal result is of the essence of incitement."[369] That requirement has not, however, always been clearly stressed in the cases, a particular example of doubt on the point being *Invicta Plastics Ltd.* v. *Clare*.[370] The case involved the advertisement of "Radatec", a device the only sensible use of which was for the detection of police radar traps, thus committing an offence under section 1(1) of the Wireless Telegraphy Act 1949. The defendants had manufactured and advertised the devices, obviously in the hope of selling them to drivers who wished to speed uncaught. However, it was not specifically argued, and it is difficult to suggest, that it was the defendants' purposive intention that the purchasers should use the device to intercept police transmissions. The only *purpose* that could reasonably be ascribed to the defendants was that they should receive the purchase price for the devices. They would, presumably, have been completely indifferent to whether or not any particular purchaser got round to actually using the devices. If therefore the "purpose" requirement is part of the law of incitement, it is

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364 Law Com No 143, paragraph 14.6.

365 See paragraph 93.

366 Law Com. No. 143, paragraph 14.6.

367 Draft Code, clause 47(1)(b), italics supplied; Code Report, paragraph 13.11.

368 That is not the law in the case of aiding and abetting: see paragraphs 2.63-2.69 above.

369 *Smith & Hogan*, p. 268.

370 [1976] RTR 251.

rendered largely nugatory if the mere supply of equipment is deemed to be equivalent to urging or persuading people to use it.[371]

2.131 Subsequent cases have not shed much light on this question. In *CBS Songs v Amstrad*,[372] which concerned the sale of machines one, but not the sole possible, use of which was the making of infringing copies so as allegedly to commit an offence under section 21(3) of the Copyright Act 1956, the House of Lords was invited to apply *Invicta Plastics*. The House did not do so, but on the ground that the conduct that the purchasers of the defendants' machines were enabled to commit did not in fact amount to the Copyright Act offence. There was no consideration of the limits of *Invicta Plastics*. At the same time, however, there was no suggestion that the case itself or its reasoning was incorrect, or that the rule that it applied was limited to cases of supply where the *sole* possible use of the device supplied was to enable a breach of the criminal law.[373] In *James and Ashford*[374] the Court of Appeal thought that supply to householders of "black boxes" designed only to cause electricity meters to under-record, and thus facilitate the dishonest abstraction of electricity,[375] could amount to incitement to commit the latter offence. Distinguishing *Invicta Plastics*, the court suggested however that supply to wholesalers would not amount to incitement; but that was because in that case there would be no "advertisement or open persuasion to others to use these devices".[376] It makes for clarity if the latter requirement, which we review in the next following paragraphs, is considered separately from any requirement of purpose on the part of the inciter that the principal crime should be committed.

Advice, encouragement and persuasion

2.132 It is suggested that, in addition to the advice or counselling that would suffice in a case of aiding and abetting, in incitement "there must probably be, in addition, an element of persuasion or pressure."[377] Specific authority for this requirement is, however, notably

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[371] *Spencer*, at p. 152. Strictly speaking, liability was imposed at an even earlier stage than supply; namely on the publication of the advertisement which represented that such articles could be supplied.

[372] [1988] AC 1013.

[373] [1988] AC, at p. 1059A-B. Lord Templeman noted that use of the devices in *Invicta Plastics* necessarily involved a breach of the criminal law, but he did not hold that that was the ratio of the case. Nor, as noted in paragraph 2.130 above, is that fact conclusive as to the purpose of the *supplier*.

[374] (1985) 82 Cr App R 226.

[375] Contrary to section 13 of the Theft Act 1968.

[376] (1985) 82 Cr App R at p. 232.

[377] *Smith & Hogan*, p. 268. It should perhaps be noted that, although persuasion or pressure is not necessary in a case of aiding and abetting, the latter branch of the law in this respect still substantially overlaps with incitement. That is because procurement, in the sense adopted in *AG's Reference (No 1)* [1975] QB 773 at p.775 of "produce by endeavour", is under the present law a distinct category of aiding and abetting: see paragraph 2.14 above. It would appear, therefore, that any case of aiding and abetting in the sense of procurement could have been proceeded against as a case of incitement even if the principal crime was never committed.

sparse,[378] and descriptions of the conduct that can amount to incitement seem to include conduct that would not be thought to amount to persuasion or pressure, except in the most anodyne sense of those expressions. Thus, "suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity";[379] "advice, encouragement or persuasion";[380] "advertisement *or* open persuasion to others".[381] The difficulty of ascertaining the law on this point is increased by the frequent use of the expression "encouragement"[382] which, as we have suggested, may conceal within itself one or other, or both, of the two separate allegations that the inciter sought to stir up or embolden the principal; or that the principal was in fact emboldened.[383]

2.133 That there remains doubt on the need for "persuasion or pressure" throws further into question whether the commission of the principal crime must be the inciter's purpose;[384] since it would be odd, though perhaps not impossible, for D to communicate with P[385] with the purpose that P should commit an offence, without D thereby in some way persuading or putting pressure on P to commit that offence. What does seem tolerably clear is that there is no requirement that the idea or proposal to commit the principal crime must have

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[378] *Hendricksen and Tichner* [1977] Crim LR 356, cited in this sense by *Smith & Hogan*, p. 268, n. 13, is only briefly reported. The appellant's contention was that an element of persuasion was necessary for incitement, and none such had been proved. The actual decision of the court was that the evidence was sufficient to permit the drawing of the inference that there had been "the necessary element of persuasion and encouragement". How far the court specifically decided that that element was part of the definition of incitement, and what the precise content of such a decision would have been, remains unclear. The observation of the Court of Appeal in *Fitzmaurice* [1983] QB 1083 at p. 1089, cited by the Code Team for this point at paragraph 14.5, n. 5, of Law Com. No. 143, seems to us, with respect, only to be directed at the need for "encouragement": see the text at n. 382 below.

[379] Holmes JA in *Nkosiyana*, 1966 (4) SA 655 at p. 658, cited in *Smith & Hogan* at p. 265.

[380] Lord Denning MR in *Race Relations Board v Applin*, cited in paragraph 2.127 above.

[381] *James and Ashford*, cited in paragraph 2.131 above, italics supplied.

[382] Eg, "The crucial question is to establish on the evidence the course of conduct which the alleged inciter was encouraging": *Fitzmaurice* [1983] QB 1083 at p. 1092B. The case was concerned with the problem of whether that course of conduct had been impossible: see paragraph 2.135 below.

[383] The Draft Code specifically rejected the suggestion that the word "encourage" rather than the word "incite" should be used to express the present law of incitement; but that was because of a fear that "encourage" might be read as requiring that the person incited was actually encouraged, in the sense of influenced, by the incitement: see Code Report, paragraph 13.6.

[384] Cf paragraphs 2.128-2.131 above.

[385] *Banks* (1873) 12 Cox CC 393 is authority, if any were needed, that an incitement, to be such in law, must be communicated to its intended object; though the communication may be by word or gesture, express or implied.

originated with D, or that D's incitement must have been the sole or indeed any substantial cause of the commission of that crime.[386]

2.134 It would also appear that an incitement need not be directed at any particular person, a general article in a newspaper sufficing if put in sufficiently explicit terms.[387] There thus does not seem to exist in incitement the uncertainty that obtains in the law of aiding and abetting as to whether it is necessary for a particular offence, committed by a particular person in particular circumstances, to be in the abettor's mind.[388]

2.135 The incitement need not be successful in persuading the incitee to commit the offence, but the act incited must still be one which, if carried out, would constitute an offence. The operation of this principle can be seen in *Whitehouse*,[389] where it was held not to be an offence for a man to incite his fifteen year old daughter to permit him to have incestuous sexual intercourse with her. If the act incited had been carried through, the man would have committed incest, but by section 11(1) of the Sexual Offences Act 1956 a girl under the age of 16 is incapable in law of committing incest with her father.[390] Where the impossibility is one of fact, rather than law, in the sense that it is not possible to carry out the acts incited, there has to be applied the principle, adopted by the House of Lords in two leading cases, that impossibility is a general defence in respect of inchoate offences at common law.[391] In *Fitzmaurice*[392] the Court of Appeal stated, obiter, that this common law principle applied to the common law offence of incitement. The only exception seems to be where impossibility results from the inadequacy of means to be used for the offence, as where A encourages B to use a pill to kill C which is in fact harmless. In these circumstances, A would appear to be guilty of incitement to murder, unless he is aware that the pill is

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[386] Williams, *Criminal Law: the General Part* (2nd edition, 1960), p.612, citing *Crichton* [1915] SALR 1. "The incitee may have no intention of acceding to the incitement, or, conversely, may have made up his mind to commit the offence and have no use for encouragement from another": Code Report, paragraph 13.6, citing the comments of the South-Eastern Circuit Scrutiny Group.

[387] *Most* (1881) 7 QBD 244. This was a case of the statutory offence of incitement to murder under section 4 of the Offences against the Person Act 1861, but the point seems to be stated generally. The point is also supported by *Invicta Plastics*, where the incitements found included a newspaper article directed at the whole world, and not only the actual supply of the device to the witness who replied to the advertisement: see paragraph 2.130, n. 371 above.

[388] See paragraphs 2.70ff above.

[389] (1977) 65 Cr App R 33.

[390] Section 54 of the Criminal Law Act 1977 reverses the effect of this decision and makes it an offence for a man to incite his granddaughter, daughter or sister, aged under sixteen, to have sexual intercourse with him.

[391] *Haughton* v. *Smith* [1975] AC 476, and *DPP* v. *Nock* [1978] AC 979. The common law has been abrogated by statute in respect of attempt by section 1(2) of the Criminal Attempts Act 1981, and in respect of conspiracy by section 1(1) of the Criminal Law Act 1977, as amended by section 5 of the Criminal Attempts Act 1981.

[392] [1983] QB 1083, at p. 1090H.

harmless. In the latter case he would not, as a matter of fact, be inciting B to kill; it is however possible that he might be inciting B to *attempt* murder: see paragraph 2.141 below.

2.136 Smith and Hogan suggest[393] that, by analogy to the cases of *Bourne* and *Cogan and Leak* in aiding and abetting,[394] it is arguable that incitement to commit an *actus reus*, even where the incitee does not have the mens rea of the principal offence, should itself constitute the offence of incitement. As these authors note, this proposition is, for the present law of incitement, excluded by the case of *Curr*.[395] In any event it is far from clear that even the authorities which relate to aiding and abetting can be explained in the terms suggested.[396] The complexities of trying to explain in rational terms the concurrent existence of incitement and aiding and abetting are very apparent at this point. When they are discussing their suggested solution to the *Cogan and Leak* problem Smith and Hogan say:

> "The most formidable objection is that the closely related crime of incitement requires proof that the inciter knew, believed or intended the person incited to have mens rea. But the difference is that the inciter is immediately liable for the act of incitement. The secondary party does not become liable as such until the actus reus is committed. Aiding, abetting, etc. and incitement are different concepts."[397]

That is, of course, an impeccable statement of the current law. It does, however, underline that if Mr Leak had merely persuaded a (knowing) Cogan to have intercourse with Mrs Leak he would have been guilty of incitement, whereas the violent, threatening and offensive conduct of Mr Leak towards his wife, in preparation for Cogan's intercourse with her,[398] would not have fixed Mr Leak with accessory liability unless Cogan's illicit intercourse actually took place.

Exemption for protected persons

2.137 The rule in *Tyrrell*, whatever its precise terms may be,[399] would seem to apply to incitement as well as to abetting, since Tyrrell herself was acquitted of the former as well as of the latter offence. There appears to be no other authority in which the implications of the rule for incitement have been explored.

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393 *Smith & Hogan*, p. 266.

394 See paragraphs 2.43ff above.

395 See paragraph 2.128 above.

396 See paragraphs 2.44-2.45 above.

397 *Smith & Hogan*, p. 153.

398 See [1976] QB 217, at p. 221D-E.

399 See paragraphs 2.83-2.88 above.

Crimes that may be incited

2.138 Incitement may be charged in respect of any offence triable in England and Wales, and is itself triable according to the method of trial appropriate for the principal offence.[400] Where incitement is tried summarily, the maximum penalty is that for the principal offence when itself tried summarily.[401] When incitement is tried on indictment, the old rule applying to common law misdemeanours remains, that the penalty is in the discretion of the court whatever the penalty may be for the crime incited.[402]

2.139 That is straightforward enough. There is, however, some complicated and, on the whole, unedifying law as to the relationship between incitement and other inchoate offences.[403] This law, it should be noted, is limited to *inchoate* offences; the grim logic that flows from the premise that an *accessory* is himself a party to a completed offence being thought to preclude any possibility of a person being charged with inciting another simply to aid and abet.[404]

2.140 We set out what appears to be the position as briefly as possible, while noting that many of the distinctions are not based on any discernible policy, but spring only from the technical structure of the law of inchoate offences. First, incitement to conspire was abolished by section 5(7) of the Criminal Law Act 1977. Second, however, because incitement is itself a principal offence, it logically follows that incitement to incite is an offence also. Thus where A urges B to urge C, for instance, to assault Mrs A, A will, in form at least, be guilty of the offence of incitement to incite.[405] Depending on the facts, however, A's conduct might be analysable as not merely urging B to *urge* C to commit the offence, but as urging B to *agree with* C that the offence should be committed. Such agreement would, or might, amount to a conspiracy. Thus if A were convicted for inciting that agreement he would be convicted of conduct that Parliament had recently, by section 5(7) of the 1977 Act, decided should not be criminal.[406] That might seem to suggest that section 5(7) abolished incitement to incite by a side-wind, because (in the example above) A must reasonably be taken to be seeking to bring about the commission of the principal crime by C, and thus necessarily C's agreement with B that that crime should be committed.

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[400] See in particular section 45 of the Magistrates Courts Act 1980, abrogating the former rule that, because incitement to commit any offence constituted a misdemeanour at common law, incitement to commit even a summary offence or offence triable either way was triable on indictment.

[401] Criminal Law Act 1977, sections 28(1) and 30(4).

[402] *Smith & Hogan*, p. 267.

[403] *Smith & Hogan*, pp. 267-268; Code Report, paragraphs 13.12-13.16.

[404] See paragraph 2.105 above.

[405] *Evans* [1986] Crim LR 470.

[406] *Sirat* (1985) 83 Cr App R 41.

However, even if that is not so,[407] it has been thought to be absurd[408] that A's liability should depend on whether or not the arrangements between B and C can be characterised as a conspiracy.

2.141 A charge of inciting to attempt an offence can only be appropriate on very special facts, because the principal offence does not have to be completed for liability for incitement to attach; and one who incites what would amount to an attempt necessarily incites the completed offence. Smith and Hogan mention the case where in the circumstances known to the inciter, but not to the incitee, the completed act will only amount to an attempt: for instance, if D gives P a substance that D knows to be harmless, telling him to use it to poison A, P can necessarily only be guilty of attempted murder of A.[409] In such circumstances, a charge against D of inciting to attempt may be logically possible; whether it is desirable as a matter of policy is another matter.

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[407] *Evans* [1986] Crim LR 470 held that cases of incitement were not necessarily also cases of conspiracy. In that case, however, A had merely asked B to procure an assassin for the killing of A's husband, and had not asked B to make any specific arrangements or agreement. That distinction demonstrates that incitement can be committed when the details of the crime incited are stated only in general terms, as discussed in paragraph 2.134 above. Even there, however, it is hard not to think that, if A was serious in what she said, she expected more from B than the putting of an intellectual suggestion to assassins at large.

[408] *Smith & Hogan*, p. 268; Code Report, paragraph 13.13.

[409] *Smith & Hogan*, p. 267; Code Report, paragraph 13.16.

PART III

THE NEED FOR REFORM

Introduction

3.1 In this Part we set out the various aspects of the present law that, in our view, require consideration from the point of view of reform. There may, however, be other ways in which that law is found to be unsatisfactory by practitioners or by others who have dealings with it. We hope that any such additional matters will be brought to our attention in response to this Consultation Paper. We deal first with the respects in which, in our view, the present law is unduly uncertain and complicated; and then with specific respects in which the rules of that law produce solutions that ought to be reconsidered.

Uncertainty and complexity

3.2 The present law of assisting and encouraging crime is almost entirely a matter of common law. Our treatment of that law in Part II showed that in our judgement, which we recognise may not be shared by all of those who use or discuss this part of the law, there is in some cases more certainty as to the current state of the law than some commentators have been prepared to accept. Nevertheless, even in those cases where we have ventured to state the law with some confidence, the common law authorities have given rise to extensive dispute,[410] none of which could be said to be based on contentions that are clearly misplaced, and all of which is liable in an unpredictable way, to burden the courts or those who have to make decisions about prosecution and law enforcement. There is an unacceptable degree of uncertainty about the current rules of the common law on at least the following issues.

How is the physical element in complicity defined?

3.3 There is substantial uncertainty about how the basic conduct constituting the offence should be described, and about what in detail it consists of, both in the case of aiding and abetting and in the case of incitement. In *aiding and abetting* it is possible to state in general terms the existence of two broad categories of encouragement and of help to the perpetrator.[411] However, the recent emphasis on the need, in describing the accessory's acts, to apply the antique language of section 8 of the Accessories and Abettors Act 1861[412] has created unnecessary difficulties for courts forced to establish the separate meaning of the various phrases used in that Act.[413] It is also far from clear whether and in what circumstances mere inactivity on the part of a person can fix him with accessory liability;[414]

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[410] See e.g. nn. 11 and 17 to Part I above.

[411] See paragraph 2.10 above.

[412] *A-G's Reference (No 1 of 1975)* [1975] QB 773.

[413] See paragraphs 2.10-2.14 above.

[414] See paragraphs 2.23-2.30 above.

and whether procurement is a separate category of offence.[415] In the case of *incitement*, although it is commonly stated that persuasion and pressure, and not merely advice, is required on the part of the inciter, both authority for that claim, and any clear indication of what effect it has as a distinct requirement of the law of incitement, are notably lacking.[416]

What is the required mental element in complicity?

3.4 There is also substantial uncertainty as to the mental element that has to be proved in order to convict an accessory or inciter. In the case of *aiding and abetting*, the recurrent inconsistency in the language used to formulate and discuss the mental element[417] has resulted in legitimate uncertainty over, and very great difficulty in analysing, issues as fundamental as whether it is necessary to establish that the commission of the principal offence was part of the accessory's purpose.[418] In the case of *incitement*, such a requirement of purpose is confidently asserted in theoretical expositions of the law, but actual cases in which liability for incitement has been imposed or discussed show that, to put the matter at its lowest, incitement may be committed by conduct that only very doubtfully reveals the bringing about of the principal crime to have been the reason why the inciter acted as he did.[419] In addition, failure to analyse the difficulties of applying any requirement of knowledge on the part of the inciter to the mental state or intention of his principal has led to uncertainty about the extent to which the person incited must in fact possess the necessary mens rea for the crime incited,[420] or at the very least criticism of the decided cases on this issue.

What knowledge must the accessory have of the principal crime?

3.5 It is quite unclear to what extent and in what detail the accessory must have known the circumstances of the principal crime to which he is party. It is well understandable that, where the accused has willingly provided assistance towards a particular crime, the courts should be reluctant to see him escape just because his assistance has in the event been used for a different crime. This tension between, on the one hand, the desire to deter anti-social behaviour, and on the other hand the doctrinal rule that an aider and abettor is a party to the actual crime committed and no other, produced the compromise solution in *Bainbridge*.[421] Compromises worked out ad hoc by the courts, without the opportunity to review the extent and merits of the technical doctrine that forces the compromise between that doctrine and the demands of reality, are likely to produce uncertainty and complex arguments about the true

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[415] See paragraphs 4.192-4.196 below.

[416] See paragraph 2.132 above.

[417] See paragraphs 2.47-2.54 above.

[418] See paragraphs 2.63-2.69 above.

[419] See paragraphs 2.130-2.131 above.

[420] See paragraph 2.128 above.

[421] [1960] 1 QB 129.

limits of the legal rules. The present state of the law as to the required degree and nature of the accessory's knowledge of the principal crime fully demonstrates how such uncertainty has been the predictable outcome of an ad hoc attempt to repair the defects of the common law.[422]

What defences are available to a charge of complicity?

3.6 There are a whole range of possible defences to, or exceptions from, accessory liability that are widely discussed in the books, and thought to be necessary by many commentators, but whose terms and limits, and in some cases whose very existence, remain obscure. We revert to a number of these cases below in considering how the present law, so far as it can be ascertained, may be thought to be defective. Here we can note, however, the uncertainty over, and the lengthy discussion that was thus necessary in Part II in respect of, the defences or exceptions of good motive;[423] performance of a legal duty;[424] protection of the victim of an offence;[425] law enforcement;[426] limitation of harmful consequences;[427] and withdrawal.[428]

The co-existence of incitement and of counselling

3.7 Uncertainty is also caused by the concurrent existence of incitement, on the one hand, and the counselling and procuring aspects of accessory liability on the other hand. Both of these parts of the law deal in broad terms with D's encouragement or persuasion of P to commit a crime. However, they spring from different sources, and are treated quite separately in the books.[429] There are some at least formal differences between the rules of the two different heads of liability; but it is very difficult to think that those differences spring from any rational view of legal policy, and recent developments in the law of incitement have tended to minimise such differences as do exist.[430]

Joint enterprise

3.8 A further example of uncertainty caused by the overlapping of rules proceeding from different theoretical bases is to be found in the recent emphasis that has been placed on the doctrine of joint enterprise. It seems likely that this doctrine imposes liability in at least some

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[422] See paragraphs 2.70-2.79 above.

[423] Paragraphs 2.59-2.62 above.

[424] Paragraphs 2.31-2.34 above.

[425] Paragraphs 2.83-2.88 above.

[426] Paragraphs 2.89-2.91 above.

[427] Paragraphs 2.92-2.94 above.

[428] Paragraphs 2.95-2.101 above.

[429] See paragraphs 1.11-1.12 above.

[430] For a summary, see paragraphs 3.3-3.4 above.

circumstances not covered by the present rules of aiding and abetting, but even that basic question is disputed.[431] Not only is it desirable to clarify the present law, but also a policy decision needs to be made as to whether in cases of a "joint enterprise" nature there should be special rules, and if so what rules, imposing liability on a more stringent basis than would follow from the ordinary law of accessoryship.

Defects in the present law

3.9 We have so far mentioned the respects in which the present law is vague, unclear, or structurally confused. Even more pressingly, however, even the comparatively certain, core, content of the present law is open to serious criticism. In the following sections we set out the aspects of that law that must be reviewed in order to decide whether the policy that it now incorporates should be maintained. It is perhaps indicative of the haphazard way in which the common law of accessoryship has developed that some aspects of the law cause concern because they appear to impose accessory liability too widely; whilst other aspects of the law cause concern because they seem unnecessarily and dangerously to limit accessory liability.

The breadth of the law

3.10 It is at least possible that, wherever a person does an act that he knows will or may encourage or assist another in the commission of a crime, he is, subject to any special defence that may exist in a particular case, guilty as an accessory. The application, and implications, of that view can be seen in *Gillick*.[432] Lord Brandon considered that the giving of contraceptive advice and treatment to a girl under the age of 16 necessarily involved the promoting, encouraging or facilitating of unlawful intercourse.[433] It would follow, although Lord Brandon did not say so in terms, that since the doctor must know that to be the consequence of his acts, he would be guilty of aiding and abetting the man's offence of intercourse with a girl aged under sixteen.[434] It was this basic proposition that led Lord Bridge, in the same case, to see as logically cogent Lord Brandon's reasoning that led to the conclusion that, absent some special dispensation,[435] the doctor would be an aider and abettor.[436]

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[431] See paragraphs 2.108-2.125 above.

[432] [1986] AC 112.

[433] [1986] AC at p. 197A.

[434] Sexual Offences Act 1956, section 6(1).

[435] Lord Bridge escaped from that unwelcome conclusion by relying on the arguments raised by Woolf J at first instance: [1984] 1 QB 594G-595E. However, those arguments either relied on a special defence that, on the facts, the girl herself would not have been guilty of an offence, under the "*Tyrrell*" rule discussed in paragraphs 2.83ff above; or assumed that on the facts the provision of contraception was not so much the provision of aid as a palliative against the consequences of the crime; or required a degree of specificity of knowledge on the accessory's part of the details of the principal's future offence that only very doubtfully represents the present law: see [1984] QB at p. 595E, and paragraph 2.57 above.

[436] [1986] AC at p. 194E.

3.11 In any event, even if special considerations can be brought to bear to exculpate, or arguably exculpate, a conscientious doctor in the (from the point of view of the criminal law) unusual circumstances of *Gillick*, those considerations will not necessarily save the accused if prosecuting authorities were to take seriously the implications of the principle stated at the beginning of paragraph 3.10 above, and enforce the law against some persons who might be thought to be caught by it: for instance, the publican who sells alcohol to someone whom he knows to be intending to drive; the shopkeeper who sells a screwdriver to a known burglar; or the landlord who lets a house suspecting that it may be used as a brothel.[437]

3.12 The statement of the law that leads to these possible conclusions has two aspects. First, it does not require the accessory to have as his purpose that the principal crime should be committed, but only "knowledge" as to that crime.[438] Second, it interprets "knowledge" in respect of the principal crime to be committed in the future not as meaning certainty that that crime will be committed, but only as involving knowledge of a risk that that crime might be committed; in effect, recklessness as to the commission of that crime. It was that rule that we incorporated in clause 27(1)(c) of the Draft Code:

> "[the accessory] is aware that [the principal] is or may be acting, or that he may act, with the fault (if any) required for the offence".

The implications of that formulation have been vigorously pointed out by at least one commentator on the Draft Code:

> "the draft makes everyone an accomplice in crime, however lawful his own behaviour, if (broadly speaking) what he did in fact assisted in an act that results in the commission of the crime, being merely aware that someone (perhaps someone whose identity was unknown to him) might do the act in question. I do not believe that this absurd rule represents the present law".[439]

Unfortunately, however, there are substantial grounds for thinking that the rule, absurd or not, is indeed the present law; though it is clearly part of the Commission's task in the present project to consider whether that should continue to be the case.

3.13 The uncertainty about the present state of the law stems largely from the absence of decided cases on this point. However, that the apparent width of the law cannot be demonstrated to have operated oppressively in practice is no reason for not taking the problem very seriously. First, unresolved, large-scale problems in the criminal law can cause difficulty and unwelcome results, unpredictably and in unexpected contexts. If the basic rules and theory of the law are uncertain, and their theoretical basis has not been properly analysed, then the courts will find great difficulty in dealing with such cases in a rational manner. It may be thought that the criminal aspects of the *Gillick* case, and the extent to

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[437] See further, paragraph 3.13 below.

[438] See paragraphs 2.70ff above.

[439] Professor Glanville Williams, [1990] Crim LR at p. 103.

which it has spawned explanations, rationalisations and appeals to rules of law not expressly referred to in the case itself,[440] provide a very cogent example of that danger.

3.14 Secondly, it can never be safe, or right, to leave undisturbed a law that is potentially very wide, and therefore at least potentially oppressive, in the hope or expectation that it will not be used or not be used oppressively. Even where alleged offenders are not actually prosecuted, the threat or fear of prosecution may be used to control their behaviour. The shopkeeper may be persuaded, or persuade himself, not to deal with known or suspected criminals; the landlord may be persuaded, or persuade himself, not to allow potential drink-drivers into his pub, even though there is nothing in the law specifically relating to licensees that prevents him from serving them; even, possibly, a newspaper might feel inhibited from publicising defects in the national security system, or in the systems of a financial institution, for fear of being accused of advising or encouraging dishonest people how to exploit those gaps before they are closed. In some such cases, it may well be that the law should be able to act. Such action should, however, not be based on vague and therefore necessarily discretionary principles, but on defined rules as to liability, agreed after the policy issues affecting such liability have been thoroughly discussed. It is one of the purposes of the present exercise to generate such rules.

Defences to accessory liability

3.15 Where a general rule appears to apply with excessive width, there will be a tendency to resort to specific defences and exceptions to mitigate its effect. This process is seen at work in *Gillick*, and in the attempted rationalisations of that case, and of cases such as *Lomas* and *NCB* v. *Gamble*. The present terms and extent of almost all such defences are uncertain.[441] Some of that uncertainty is caused simply by lack of detailed discussion in the cases; some, however, is caused by failure to decide the function that the defences are supposed to perform. Defences may be required to mitigate what might otherwise be thought to be the excessive width of accessory liability: for instance, the defences of good motive and mitigation of harm that may or may not have been deployed in *Gillick* itself. Or they may be needed to meet particular embarrassments, such as the prospect of a person becoming liable as an accessory simply because he did something that he was under a legal duty to do, as was or might have been the case in *Lomas* and *NCB v Gamble*.[442] Or they may be thought to be a necessary limitation on the law of accessoryship, however broadly or narrowly that law may be defined, as is perhaps the case with the authority associated with *Tyrrell*.[443] The terms and limits of such defences need to be separately considered, not merely as limitations on whatever may be thought to be the desirable general rule of accessory liability, but as issues of policy in their own right.

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[440] See for instance n. 289 to paragraph 2.94 above.

[441] See the summary in paragraph 3.6 above.

[442] See paragraphs 2.31-2.34 above.

[443] See paragraphs 2.83-2.88 above.

3.16 That consideration should extend not merely to the types of defence that so far have been, or may have been,[444] recognised, but also to other possible defences to what might otherwise be thought an excessively wide reach of the law. These cases include in particular a defence for a shopkeeper (and, possibly, publican) whose accessory conduct takes the form simply of providing objects or supplies in the ordinary course of business, with indifference as to whether or not their foreseeable use to assist in or promote the commission of crime in fact takes place.[445] This again is a question of policy, though intermingled with the question of whether it should, generally speaking, be possible to be guilty of accessory liability at all by reason of a state of mind simply of indifference to the commission of the principal crime.

The narrowness of the law

3.17 The most obvious potential gap in the present law is that there is no offence of inchoate aiding, that is, of D assisting towards a crime by P that is not in the event committed. Aiding and abetting only becomes criminal once the aided crime has actually been committed. We emphasise inchoate *aiding* because the gap is less obvious in practical terms in the case of the version of accessory liability represented by counselling. If the conduct of a counsellor fulfils the requirements of *incitement*, the counsellor can be convicted of that (inchoate) crime. That has indeed led to suggestions that recent developments in the law of incitement, apparently undervaluing what had previously been thought to be the necessary element of purpose that the principal crime should be committed,[446] have been influenced by a desire to convict dishonest persons whose true offence is to be willing to assist in, rather than in fact to incite, the commission of a crime.[447]

3.18 That the present law formally prevents a conviction in respect of any form of aiding unless the crime sought to be aided is actually committed gives rise to concern on at least three grounds.

3.19 First, if that law is loyally and properly applied, there will be categories of anti-social conduct that it is arguable that the law should control, but which it is powerless to prevent, at least by the law of accessory liability. Thus, for instance, where D is prepared to, and does, provide P with the means to enable P to escape from lawful custody,[448] it is hard to

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[444] Thus, it is for instance uncertain whether in the present law there is authority for the defence, suggested in clause 27(6)(a) of the Draft Code, that one cannot be guilty as an accessory in respect of anything done with the object of preventing the commission of the principal offence: see paragraph 2.89 above. The ambit of that defence, and its relationship with the basic intention that has to be proved in any case of accessory liability, obviously needs to be clarified.

[445] See further paragraphs 4.113-4.116 below.

[446] See paragraphs 2.130-2.131 above, discussing *Invicta Plastics v Clare* [1976] RTR 251.

[447] *Spencer*, pp. 152-154.

[448] Adapting the facts of *Anderson* [1986] AC 27, discussed in paragraph 3.24 below. In that case, not only did P not succeed in escaping from custody, but D's case was that the means provided by him would not have been effective, and were not intended to be effective, in furthering such an escape. Even on that basis,

see that his conduct is made any the less anti-social if P happens to be apprehended before he can put his escape plan into action.[449] Somewhat similarly, people who provide devices to detect police radar traps[450] or to abstract electricity[451] can be argued to merit control and punishment, if at all, irrespective of whether the persons supplied actually go on and commit the offences envisaged by their suppliers.

3.20 This gap in the law is at the very least a potential handicap to effective law enforcement. Where assistance is being provided for known future criminal activity, it is arguably very undesirable that if law enforcement agencies are to secure convictions of the assisters, they must wait until the projected crimes are actually committed. At the very least, serious consideration needs to be given to the question whether assistance, like incitement, should be controllable and punishable in its own right and without the need to wait until the crime assisted actually takes place.

3.21 These difficulties of policy, and of law enforcement, are further illustrated by steps that have been taken to ameliorate the effect of the rule that a person can only be an accessory to a crime that is actually committed. Because these steps arguably represent ad hoc divagations from strict principle in order to accommodate particular practical difficulties, they have in their turn introduced uncertainties into the parts of the law that have been so treated. Those uncertainties represent the second and third grounds on which concern has been expressed about the effect of there being no offence of inchoate aiding.

3.22 Second, therefore, severe difficulties have been caused by cases where, in the most typical example, D has provided P with equipment for use in crime *x*, and P has in fact used that equipment in crime *y*.[452] On a strict application of the conjunction of the rules that D can only be an accessory to a crime actually committed; and that he must know the essential matters that constitute that crime;[453] D should be free of liability, since on the facts as

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however, D was found guilty of conspiring to commit the offence of escaping from lawful custody. As pointed out in paragraph 3.25 below, it is difficult to justify that outcome if there are reasons of principle why active and conscious assistance, going beyond the mere agreement that founds a conspiracy charge, is nonetheless prevented from being criminal *as an act of assistance* because the principal crime sought to be assisted is not in the event committed.

[449] If P has got so far towards the commission of the principal crime as to be guilty of attempting it, D can be convicted of aiding and abetting that attempt: see paragraph 2.103, n. 305, above. Whether P proceeds that far may, however, be, as far as D is concerned, entirely fortuitous; and in any event, because of the comparatively stringent limits on liability for attempt, such a charge may well not be available in many cases where D has plainly given assistance towards the commission of the crime intended by P.

[450] *Invicta Plastics v Clare* [1976] RTR 251.

[451] *Hollinshead* [1985] AC 975.

[452] *Bainbridge* [1960] 1 QB 129, discussed in paragraphs 2.71-2.79 above.

[453] *Johnson* v. *Youden* [1950] 1 KB 544 at p. 546.

posited he can only be charged as an accessory to the actually committed crime *y*,[454] and he did not have the necessary knowledge with regard to *that* crime. The compromise or, on a more severe view, evasion of this rule achieved in *Bainbridge*, that knowledge of the "type" of crime intended by the principal is enough, was no doubt, in terms of law enforcement in the particular case, necessary and sensible. It has, however, left very considerable uncertainty in the law.[455] It has also, perhaps unintentionally, and certainly without detailed argument and discussion, very substantially widened the basic rule as to the mens rea of an accessory, since it leaves open the possibility of convicting a man as accessory to crime *y* when he had no knowledge or foresight of any aspect of that crime.[456]

3.23 In this latter case, the moral and social justification for convicting the accused can only be that he was perfectly willing to assist in crime *x*. There is a pressing need to consider whether the accused's liability would not be more clearly stated, and easier to limit and justify, if it were expressly based on the criminal acts that he intended to assist, whether or not those acts were in fact committed; rather than upon other criminal acts that, perhaps entirely fortuitously, were committed with the equipment supplied by him.

3.24 The third respect in which the rule that there is no offence of inchoate aiding has been seen as causing difficulty is that, in order to escape the consequences of the rule, it has or may have been necessary to extend the limits of other parts of the law, most notably conspiracy and incitement.[457] That can be briefly illustrated from *Anderson*.[458] Section 1(1) of the Criminal Law Act 1977 defines the crime of conspiracy as occurring

> "if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions."

The defendant in *Anderson* claimed that whilst he had in terms agreed to provide assistance for a planned escape from prison, he never intended or expected the plan to succeed; and thus the agreement would never have been carried out in accordance with *his* intentions. Lord Bridge held that such individual intention was not necessary, and gave the following example:

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[454] *Spencer*, p. 150, valuably emphasises this point, which is far from being merely a technicality. Because, as explained in paragraph 1.11 above, an aider and abettor is guilty of, and a party to, the principal offence, he has to be charged as an accessory to a specific offence committed at a specific time and at a specific place, and not just as an accessory to "crime" or "burglary" in general: see *Archbold* (42nd edition, 1992), at paragraph 18-14. To accord with that requirement, any rule about mens rea must relate to, and be satisfied by, the accessory's mental state with regard to that crime, and no other.

[455] See paragraphs 2.74-2.76 above.

[456] See paragraph 2.72 above.

[457] This point is expounded in detail in *Spencer*, pp. 152-156.

[458] [1986] AC 27: see paragraph 3.19, n. 448 above.

> "The proprietor of a car hire firm agrees for a substantial payment to make available a hire car to a gang for use in a robbery....Being fully aware of the circumstances in which the car is proposed to be used he is plainly a party to the conspiracy to rob. Making his car available for use in the robbery is as much part of the relevant course of conduct as the robbery itself. Yet, once he has been paid, it will be a matter of complete indifference to him whether the robbery is in fact committed or not."[459]

Lord Bridge concluded that since Parliament must have intended the proprietor to be guilty of conspiracy on those facts, the present defendant, who similarly lacked *intention* that the principal crime should be committed, must equally be caught.

3.25 This example is revealing in a number of ways. First, the conduct described is most naturally thought of as that of an assister, rather than merely as of one who *agreed* that the principal crime should be committed: yet, if the robbery is not committed, for whatever reason, the law that specifically punishes assisters is not available. Second, it is a strongly contested question whether "complete indifference" to the actual commission of the principal crime should save an accessory to a completed crime;[460] that question is however ignored where the principal crime is *not* committed, *provided* that the exchanges between accessory and principal can be characterised as a conspiracy. Third, in *Anderson* an alleged assister was found guilty of conspiracy even though he did not think that his contribution would assist the commission of the principal crime. That involved not only a controversial interpretation of the statute defining the crime of conspiracy,[461] but also the application of a more severe rule than would have applied if the principal crime had been committed and the accused in *Anderson* had been charged as an accessory. In those circumstances it would have had to be shown that he knew that his acts were capable of assisting and would assist in the commission of the principal offence.[462]

3.26 In this case, therefore, the law of conspiracy has to be deployed to fill a gap in the law of assisting crime. The application of that law resulted in making a more stringent rule available where the principal crime has not been committed than would be available, under the rules of aiding and abetting, where that crime had been carried through. But, on the other side of the coin, conspiracy will sometimes not be available at all to piece out the imperfections of aiding and abetting. The law of conspiracy requires agreement or meeting of minds; even if, as in *Anderson*, that agreement can be one in form only. But assistance can occur when the principal does not know that he is being assisted,[463] and there is no obvious reason of policy why that should not be so. In such a case, there would be no ground for alleging even in form an agreement between principal and accessory; and thus,

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[459] [1986] AC at p. 38E-F.

[460] See paragraphs 2.63-2.69 and 3.12-3.14 above.

[461] *Spencer*, p. 155.

[462] See the statements of the minimum mental element in the present law of aiding and abetting that are quoted in paragraph 2.55 above.

[463] See paragraphs 2.20 above and 4.193 below.

even under *Anderson*, no possibility of falling back on the law of conspiracy to catch the case where the crime thus sought to be assisted does not in fact take place.

3.27 For all these reasons, the rule that the principal crime must actually be committed before accessory liability can attach must be reconsidered in the course of the present exercise. However, if the rule were altered that would have significant implications for the other rules of accessory liability, and these matters are therefore reviewed in detail in Part IV below.

3.28 The absence of an offence of inchoate aiding is the most obvious potential gap in the present law. There may, however, also be some lacunae in the rules as to the types of principal offence, including in particular inchoate offences, to which accessory liability and liability for incitement can attach. The present law has developed in a haphazard fashion, and can best be described as obscure.[464] This is an opportunity to reconsider the question on the basis of policy rather than merely of history.

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[464] See paragraphs 2.103-2.105 and 2.139-2.141 above.

PART IV

OPTIONS FOR REFORM

INTRODUCTION

4.1 In this Part we put forward, for consideration, provisional proposals as to how the law of assisting and encouraging crime might be clarified, reformed, and put on a statutory basis; to form a part, in the longer term, of the criminal code.

4.2 As in all the Commission's consultation papers, the proposals that now follow are put forward for consultation, and with as much exposure as we are able to give of the arguments for and against the various alterations that we suggest; and the comments and criticisms of readers are invited in respect of all that follows. It is particularly necessary to emphasise that point because, in order to impose some coherence on our treatment of the unstructured common law sources, we have found it necessary to make some preliminary assumptions about the overall structure of the future law. Those assumptions are set out and explained in paragraphs 4.8-4.16 below. We trust that this approach will not inhibit critical consideration of our proposals; indeed, we are firmly of the view that, until some such basic structure of the subject has been accepted, it is impossible to discuss reform of the law in any coherent manner. However, we leave open the possibility that consultees will demonstrate that we are wrong even on that point.

4.3 Because of the range and variety of the issues that have to be considered, it may be helpful to readers if we briefly summarise here the content of this Part of the Consultation Paper.

4.4 We start by dealing with the two issues of the basic structure of the law that we referred to in paragraph 4.2. These are:

(i) The separate consideration of influencing the commission of crime, on the one hand, and assisting the commission of crime on the other (paragraphs 4.9-4.11 below).
(ii) Whether the law of aiding and abetting and the law of incitement should be considered together (paragraph 4.12 below).

4.5 Within that framework, we then explain that most of the contested issues in the present law arise in the context of assisting the commission of crime. That will therefore form the main context of the discussion, thus allowing much briefer reference to issues that only affect, or affect in a particular way, influencing as opposed to assisting the commission of crime (paragraphs 4.13-4.17 below).

4.6 The discussion of assisting crime is prefaced by consideration of the important policy issue of whether assisting crime should become an inchoate offence (see paragraphs 4.18-4.46 below).

4.7 Our provisional conclusions on these major issues of the structure of the subject are that (a) there should be created separate offences of assisting crime and of encouraging crime;

and (b) the offence of assisting crime should be put on to an inchoate basis. On those assumptions, therefore, our provisional proposals are then set out as follows:

(i) The basic elements of the proposed new offence of assisting crime are discussed in paragraphs 4.47-4.91, and summarised in a provisional definition of the new offence in paragraph 4.99.

(ii) Possible defences specific to the offence of assisting crime are discussed in paragraphs 4.100-4.142.

(iii) The basic elements of the proposed new offence of encouraging crime are discussed in paragraphs 4.143-4.162, and summarised in a provisional definition of the new offence in paragraph 4.163.

(iv) Possible defences specific to the offence of encouraging crime are discussed in paragraphs 4.165-4.169.

(v) Other issues, common to both the offences of assisting and of encouraging crime, are discussed in paragraphs 4.170-4.190.

(vi) Certain other policy issues, arising from our study, are discussed in paragraphs 4.191-4.221.

GENERAL ISSUES

The future structure of the law

4.8 Two, separate but interrelated, matters must be discussed. First, the nature, and proper analysis, of the conduct to be covered by the law of assisting and encouraging crime. Second, whether there should be maintained the present distribution of that law between accessory liability on the one hand and the inchoate offence of incitement on the other hand.

Types of accessory conduct

4.9 Until very recently, the conduct that constitutes aiding and abetting had been thought to fall into one of two, albeit sometimes overlapping, categories: conduct that encourages or influences the perpetrator; and conduct that helps the perpetrator to carry out the offence. It was not possible to regard that as a complete or accurate statement of the present law, because such analytical questions have never been definitively confronted in the common law authorities; and the question has in any event been clouded in recent years by the insistence in *AG's Reference (No 1 of 1975)*[465] that each of the words aid, abet, counsel, or procure used in section 8 of the Accessories and Abettors Act 1861 denotes a separate head of accessoryship.[466]

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[465] [1975] QB 773.

[466] For the foregoing, see paragraphs 2.10ff. above.

4.10 However, commentators not bound by particular legislative accidents[467] have been clear that accessoryship or complicity has basically two natures:

> "Two kinds of actions render the secondary party liable for the criminal actions of the primary party: intentionally[468] influencing the decision of the primary party to commit a crime, and intentionally helping the principal actor commit the crime, where the helping actions themselves constitute no part of the actions prohibited by the definition of the crime."[469]

We agree with that general view. It accurately distinguishes the two different types of conduct that constitute accessoryship, and clarity in expounding a law of accessoryship or secondary liability will only be achieved if this distinction is recognised as the foundation of the law. The remainder of this Consultation Paper proceeds on the basis that our subject matter consists mainly of two, separate, activities: assisting crime; and encouraging crime.

4.11 That decision necessarily implies that the approach in *A-G's Reference (No 1)* must be abandoned, and section 8 of the 1861 Act is consigned to history. We are quite clear that that is the only sensible approach to these recent developments in the law. The case is, we have to say with respect, an historical aberration, that gives section 8 a weight and significance that were clearly not intended by the legislature, and which had been rejected by previous authority.[470] But it is not merely the misinterpretation of the statutory provisions, but also, and more importantly, the complications to which that approach has led[471] that make it imperative for a new start to be made.[472]

Aiding and abetting and incitement

4.12 During our work we have not become aware of any good reason why there should be separate chapters of the law dealing with aiding and abetting (including the "counselling and procuring" aspects of aiding and abetting) on the one hand; and incitement on the other hand. The textbooks merely note that the two concepts are different, in that aiding and abetting is a form of, albeit derivative, principal liability for a crime actually committed; whilst

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[467] "My description of the law.....does not attempt to depict the state of the law in any particular jurisdiction...[but] to identify the central problems of complicity and the dominant resolutions of those problems.": Kadish (1985), 73 California LR at p.325.

[468] This term, referring as it does to the awareness and intentions of the accessory, rather than to the nature of his acts, requires a good deal of interpretation: see further paragraphs 4.76ff below.

[469] Kadish, *op. cit.*, at p. 342; cited with strong approval by Williams, [1990] Crim LR at p.7.

[470] See paragraph 2.10, n. 71, above.

[471] See paragraphs 2.10-2.22 above.

[472] We will consider separately, in paragraphs 4.192ff below, a further distinct category of complicity in crime constituted by what is currently described as procurement.

incitement is a form of inchoate liability.[473] The requirements of the two very similar forms of liability have never been rationally considered together, outside the straitjacket of their different historical origins. In what follows we will assume that a single set of rules should be developed to cover all cases of assisting and encouraging crime, without the present structural distinction between aiding and abetting and incitement.

Assisting and encouraging

4.13 We therefore address the problems of law reform by assuming that there should be two new offences, to take the place both of the present law of aiding and abetting and of the present law of incitement.[474]

4.14 The separate consideration of assisting crime on the one hand and encouraging crime on the other[475] enables us to isolate, and to confine to their proper sphere, some of the most pressing policy issues on which we seek the views of consultees. That is because two of the most important issues arise in connection with assisting, rather than with encouraging, crime. First, the question of whether assisting should become an inchoate offence, in the sense that the assister may be guilty even if the principal crime is not in the event committed. Second, the question of whether the mental state of an assister necessary for conviction should be expressed in terms of purpose that the principal crime be committed; or, as in the present law of aiding and abetting, merely in terms that the accessory is liable when he does an act of assistance and is aware that the principal may be going to act with the fault required for the principal offence.[476]

4.15 These are not live issues in respect of *encouraging* crime. The terms of the proposed offence of encouraging crime that we submit for consideration[477] are broadly the same as the rules of the present offence of incitement.[478] An inciter or encourager's mens rea, in terms of purpose that the principal offence should be committed, follows naturally and

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[473] *Smith & Hogan*, p. 153; *KJM Smith*, p. 9. Professor KJM Smith indeed suggests that "the common law's entrenched attachment to punishing involvement in the causing of demonstrable harm" had until the seventeenth century been a barrier to the development of inchoate offences generally, which latter were only created under the influence of the Star Chamber. By then, however, complicity had already been developed at common law as a form of responsibility for the "demonstrable harm" constituted by the commission of a substantive offence. That history seems to have obscured from view the need to consider whether complicity, which performs such a similar role to incitement and conspiracy, should like them be developed as a form of inchoate liability.

[474] For the special problems of offences of "procuring", see paragraphs 4.192-4.197 below.

[475] See paragraph 4.10 above.

[476] See paragraphs 4.76ff below.

[477] See paragraph 4.163 below.

[478] Our formulation specifically recites the requirement that the inciter should have as his purpose that the principal crime be committed, which requirement has recently been undermined in an attempt to catch, by use of the offence of incitement, cases that are in truth more correctly cases of inchoate aiding: see paragraphs 2.130-2.133 above.

inevitably from the nature of his conduct. The very description of that conduct as having encouraged, provoked, incited, stirred up or cheered on the commission of a crime presupposes a desire on the encourager's part that that crime should be committed. Nor has there ever been thought to be difficulty about incitement as an inchoate offence. If D positively encourages P to commit a crime, it has never been questioned that D should be guilty of the offence of incitement even if, for whatever reason, P did not in the event commit the offence incited. It has long been accepted that positively to encourage another to commit a crime is a sufficiently undesirable act to be punishable by the law whether or not the crime encouraged is in fact committed.

4.16 The issues identified in paragraph 4.14 above are, however, contested and difficult questions in relation to assisting crime. That activity, as part of the present law of aiding and abetting, is at the moment only itself criminal if the principal crime is in fact committed, though many weighty commentators have urged that that rule should be changed.[479] At the same time, however, something far less than purpose that the principal crime should be committed suffices in the present law to convict an assister of aiding and abetting.[480]

4.17 It will therefore be convenient if we discuss the proposed offence of assisting crime separately from the proposed offence of encouraging crime. Within that discussion we will confront the major policy questions just referred to. We will then, more briefly, discuss the offence of encouraging crime; and then a range of difficult, but less central, issues that are common both to assisting and to encouraging crime.

ASSISTING CRIME

An inchoate offence of assisting?

4.18 We take first the question of whether assisting crime should become an inchoate offence, liability for which will attach even if the principal crime is not committed. This issue does not arise when D assists at and during the actual commission of the crime by P, in the manner of the old principal in the second degree,[481] since there the principal crime will always necessarily either be committed or be in the course of commission. The problem relates only to assistance given in advance of the principal crime, or at least away from its actual or believed place of commission.

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[479] JC Smith [1971] Crim LR at p.74: "the solution seems clearly to be to provide that the crime should be complete when the act of encouragement or assistance is done"; Professor Sir Rupert Cross in Cross & Jones, *Introduction to Criminal Law* (7th edition, 1972), at p.116: "Anyone who has had to contend with the technicalities disclosed by even a brief outline of the law... must surely hope that the most serious consideration will be given to the suggestion [of an inchoate offence of assisting] by future codifiers of the law"; *Ashworth*, at pp. 383 and 417-418: "it is a matter of chance whether P commits the principal offence or not. Courts have striven to fill this gap by bending the law of incitement....but the preferable approach is to recognise the deficiency in the law and to fill it with an offence of facilitating crime"; and, more generally, *Spencer*.

[480] See n. 476 above.

[481] As to whom, see paragraph 2.7 above.

4.19 We have already set out, in paragraphs 3.17-3.26 above, the many difficulties caused in the present law by the requirement that liability for assistance, as opposed to encouragement, can only attach if the principal crime is actually committed: difficulties that many commentators have urged should be avoided by the creation of an offence of inchoate assistance.[482] Those difficulties are of two different kinds.

4.20 First, problems of social policy associated with law enforcement.[483] It may be thought clearly undesirable and antisocial for D to give active assistance towards the commission of a crime; and it may be thought unsatisfactory that the law enforcement agencies have to wait until that crime is actually committed before they can intervene to control the conduct of assisters. To that extent the present law may be thought ineffective. Second, however, the absence of an offence of inchoate aiding has caused the rules both of aiding and abetting itself, and of related parts of the law, to be significantly distorted, in order to provide for cases in which prosecution for inchoate aiding would be the more natural remedy. To that extent, the law may be thought undesirably wide and vague.[484]

4.21 Concern about the distortions created in the law is not limited to the difficulty thereby caused in stating the law clearly and on the basis of consistent principle, though that problem is severe enough. Rather, such developments appear to indicate an unexpressed belief, correct or not, that cases that seem naturally to be ones of inchoate assistance should be legally punishable.[485] Thus, the *Bainbridge* rule is impossible to reconcile with any requirement of knowledge on the part of the accessory as to the crime *actually committed*,[486] but appears tolerable because the "accessory" was willing to provide assistance towards another, uncommitted, crime; one who provides assistance for an escape from prison that is foiled before it takes place is in reality an inchoate aider, and the authorities should be able, and perhaps indeed obliged, to prosecute him as such, and not have to fall back on the vaguer and less immediate offence of conspiracy;[487] and the conduct of people who simply provide instruments to be used in committing crimes, but with indifference as to whether those crimes are in fact committed, is more naturally, and more accurately, described as assistance rather than incitement.[488]

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[482] See n. 479 above.

[483] See paragraphs 3.19-3.20 above.

[484] See paragraphs 3.21-3.26 above.

[485] This thesis is expounded in forceful detail in *Spencer*, pp. 148-156.

[486] See paragraph 2.70, and n. 454 to paragraph 3.22, above.

[487] See paragraphs 3.24-3.25 above.

[488] See paragraph 2.130 above, discussing *Invicta Plastics v Clare*.

4.22 That courts and prosecutors have been forced into these expedients in recent years may be thought to indicate the existence of a gap in the present law of accessoryship.[489] In the cases mentioned, the anti-social nature of the accused's conduct consists in the assistance that he seeks or is willing to give towards the commission of crime. It would produce a clearer and more principled solution to the problem that such conduct poses if it were proceeded against, if at all, as a case of assisting, rather than as incitement, conspiracy, or, in the *Bainbridge* type of case, as a distorted version of the orthodox law of accessoryship.

4.23 We therefore share the view of other commentators[490] that serious consideration must be given to the introduction of an offence of inchoate assisting. A good deal will, of course, depend on the precise definition of that offence, and of the mental element that has to be established in order to convict of it. We have concluded, however, that that issue should be discussed as part of the general requirements of a single offence of assisting crime, with the same rules to apply whether or not the principal crime is actually committed. We take that view because, far from the inclusion of inchoate aiding distorting the terms of an offence of assisting crime, it will in fact cause discussion of that offence to focus on the proper issues.

4.24 That may at first sight seem surprising. However, the conclusion that an accessory's liability is, *even in the present law*, essentially inchoate in nature springs directly from analysis of the conduct that founds that liability in law. An accessory's legal fault is complete as soon as his act of assistance is done, and acts thereafter by the *principal*, in particular in committing or not committing the crime assisted, cannot therefore add to or detract from that fault. Moreover, it is not the present law, and it is logically impossible that it should become the law,[491] that the accessory must *cause* the commission of the principal crime; and for that reason also the actual occurrence of the principal crime is not taken into account in assessing the accessory's culpability. Even under the present law, therefore, where the principal crime has to be committed before accessory liability can attach, the conditions for the liability of the accessory should be, indeed can only be, assessed at the time of, and in relation to, that act of assistance. Thus, the issues as to, for instance, the purpose or awareness of the shopkeeper who sells the known burglar the screwdriver can only be assessed at the point of sale, when, in relation to the eventually completed principal crime, his liability undoubtedly remains "inchoate". His subsequent awareness or purpose, when or after the principal crime is actually committed, cannot affect the legal status or culpability of an act that he has already completed.

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[489] The Commission's Working Party, considering the matter in 1973, were of a different opinion, because "despite the attraction presented by the opportunity of filling this apparent gap in the law...there has not hitherto been any demand for the creation of such an offence and because in principle inchoate offences ought not to be proliferated unless the need for them has been demonstrated": WP No. 50, paragraph 4. The strains of more recent years have changed the picture somewhat. Further, and importantly, as we explain in paragraphs 4.26ff. below, inchoate liability for assisting crime should be seen not as an entirely new offence, but as the logical application in accessory liability of principles that already operate in that part of the law.

[490] See n. 479 to paragraph 4.16 above.

[491] See paragraph 2.18, n. 94, above.

4.25 Even under the present law, therefore, the requirement that the principal crime should actually be committed adds nothing to the analysis of accessory liability, and does not serve as any sort of principled limitation on that liability. Rather, it serves as an additional condition for liability, that may, however, enable some "assisters" to escape conviction, possibly in a quite erratic and unmeritorious fashion.

4.26 An inchoate offence of assisting, if it is to be created at all, should therefore logically cover the whole of the law of assisting, and not be simply a special offence used only when the principal crime is not committed. In the most usual case the act of assistance will only come to light, or be thought to be worth prosecuting, where the principal crime has in fact been committed. In practice, therefore, to put assisting on an inchoate basis is unlikely greatly to extend the reach of the law; and, indeed, the clarification and limitation of the mental element in the offence of assisting that is made possible by concentration on the actual intentions and beliefs of the assister will certainly reduce some of the vaguer and potentially intrusive aspects of the present law.[492]

4.27 That said, however, at least in theory a law of inchoate assisting will create liability in cases that some readers may at first sight find surprising. In the next section we therefore set out in broad terms what the potential reach of such a law would be; indicate what might be seen as the objections to such a law, on the one hand, and the objections to not adopting such a law on the other hand; and particularly invite the comments of consultees.

4.28 We have to sound one note of warning. Because of the importance of this issue we put it at an early stage of our discussion, before descending into the details of a possible inchoate offence of assisting. In so doing, we have to mention some aspects of that offence that are expounded in much fuller detail later in the paper. Readers may therefore wish to suspend final judgement until they have seen the whole of the discussion of the proposed offence of assisting, and only then return to the question of whether that offence should be placed on an inchoate basis.

Objections to an inchoate offence of assisting

Preliminary: the broad characteristics of the offence

4.29 We have noted in paragraph 4.27 above that liability for assisting on an inchoate basis may produce results that, viewed objectively, appear surprising or undesirable. Those problems cannot be properly considered without a clear view of the full range of cases to which an offence of inchoate assisting might extend. In this sub-section, therefore, in order to assist critical assessment of the possibility of an inchoate offence, we set out what we consider, subject to consultation, to be the limits of the new offence of assisting, and give examples of cases to which it would extend if it were to be placed on an inchoate basis.

4.30 Readers may find it convenient to refer to the provisional definition of the new offence that is set out in semi-statutory form in paragraph 4.99 below. We consider, subject to consultation, that the new offence should apply to assistance in the commission of all statutory

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[492] See paragraphs 4.82-4.86 below.

or common law offences; that "assistance" should be understood in a broad commonsense manner,[493] but should exclude any such assistance by mere omission;[494] that any such act of assistance, even of a trivial nature, should come within the offence;[495] and that the nature and legal categorisation of the offence assisted should be identified, but not necessarily the time, place or other details of the offence.[496]

4.31 A further important and difficult question concerns the mental element of the new offence. As already indicated in connection with the present law, there are two competing candidates: that the accessory should have as his purpose that the principal crime be committed; and that, as is the present law, he should merely have some form of awareness that the principal crime may be committed. In this paper we provisionally propose that, if "awareness" is to be the test, it should at least be expressed in terms of the accessory's knowledge or belief that the principal crime is to be committed, in order to avoid the outcome, entirely possible under the present law, of convicting an assister who merely suspects that what he does may be of assistance towards a criminal offence.[497] However, even after that amendment there are strong arguments in favour of limiting the offence of assistance to cases where it is the assister's purpose that the principal offence should be committed. Consultees' views as to the appropriateness of an *inchoate* offence of assisting may well be affected by whether that offence requires purpose, or only knowledge or belief, as to the commission of the principal crime.

4.32 For the purposes of the instant discussion, however, we will make the working assumption that it will suffice for liability for assisting an offence that the assister knows or believes that he is assisting the principal to do something that, if completed, would constitute the commission by that principal of an identified offence. On that approach, it is possible to formulate some extreme cases that could potentially fall under the new offence. Thus:

D, a publican, or a generous host, believes that P is going to leave the premises in his car, but continues to ply him with drink to an extent that puts him well over the statutory limit. P does not in the event drive home.

D agrees to pay P, a builder doing repairs to his house, in cash rather than by cheque, believing that P wants payment in this form to assist him in defrauding the Inland Revenue. P in fact makes a proper return to the Revenue, either because he so intended all along, or because he suddenly realises the consequences of fraud.

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[493] See paragraphs 4.47ff below.

[494] See paragraphs 4.69-4.75 below.

[495] See paragraphs 4.64-4.68 below.

[496] See paragraphs 4.57-4.58 below.

[497] For vigorous criticism of the present law, see paragraph 3.12 above.

D sells P oxy-acetylene equipment, believing that P intends to commit a burglary using it. P does not commit the burglary: either because he is arrested at the scene of the crime; or because he thinks better of it; or because he never intended to do so.

D gives P advice[498] as to how to circumvent the alarm system at a Bank, believing that P is going to use the advice to assist him to commit a burglary there. Because the advice is incorrect, P is unable to commit the burglary.

4.33 In all these cases, the principal crime has not taken place and therefore on one view no, or no sufficient, harm has occurred. That leads to objections at various levels of generality to an offence of inchoate assisting, which we consider in the following sections.[499]

Non-intervention by the criminal law

4.34 This objection simply says that in cases where the principal crime has not been committed, and in particular in cases of the type referred to in paragraph 4.32 above, it is simply inappropriate for the criminal law to intervene. It may well be admitted that in each such case the conduct of D is much less than admirable. He is willing to do something that he thinks will assist the commission of a criminal offence, and thus actively and positively infringes the social obligation of a citizen to support, or at least not to attack, the law. But in the event, for whatever reason, the principal crime has not been committed; and it may therefore be thought inappropriate, unduly intrusive, or a waste of resources to bring the assister within the ambit of the criminal law. It can also be argued that where no substantive, principal offence has in fact occurred, the criminal law should be slow to intervene to impose constraints on behaviour, and indeed punishment. Comparisons might be drawn in this respect with the law of attempt, where the principal who fails to commit his crime will not be open to control by the law unless he has done an act more than merely preparatory to the commission of that crime.[500]

4.35 Consultees will no doubt wish to bear these considerations in mind when commenting on the proposals in this paper. Two observations might, however, be ventured at this stage.

4.36 First, an inchoate offence of assisting does not, any more than does the inchoate offence of attempt, or of incitement, punish for thoughts alone. In all these cases the defendant must have *acted* on the strength of his beliefs, and have been ready so to act in a way that would, if his beliefs were correct, constitute, or (in the case of accessory liability) assist the commission of, conduct deemed by the law to be criminal. In some cases, such as the hypothetical cases suggested in paragraph 4.32 above, that may produce liability for conduct that, viewed "objectively" (that is, without reference to the accused's beliefs and intentions), appears to be innocuous. In the parallel case of attempt, however, Parliament has determined that liability should attach to actions taken on the strength of the accused's

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[498] For advice as assistance, see paragraphs 4.52ff above.

[499] For further discussion of some of the points that follow see *Spencer*, at pp. 159-164.

[500] Criminal Attempts Act 1981, section 1(1).

beliefs even though, in truth, commission of the completed crime was an impossibility.[501] And the House of Lords has recently stressed that liability in attempt should indeed be judged on the basis of the accused's intent and his carrying of those intentions into action, and not according to whether what he does is objectively innocent.[502] Consultees may wish to have that parallel in mind when considering the practical impact, and justification in policy terms, of an inchoate offence of assisting.

4.37 Second, and more pragmatically, if the offence of assisting is not put on an inchoate basis, the law has no way of meeting the difficulties that are at present caused by the rule that there cannot be a conviction in respect of any form of assistance unless the crime sought to be aided is actually committed.[503] Consultees may wish to consider whether any objections that they see to an inchoate offence of assistance outweigh the need to find a solution for the problems of the present law.

Comparison with the unconvicted principal

4.38 A further particular objection is that an inchoate offence of assisting could produce results that are, at least on the face of them, inconsistent and, thus, unfair. Thus, D provides equipment to P for P to use in a burglary on the following day. P is arrested, or repents, as he leaves D's house with the kit. P has committed neither burglary nor attempted burglary, and is liable for no preparatory offence in relation to that burglary; but D will be liable, for inchoate assistance in that burglary. In practice, D would be unlikely to be prosecuted, and it might in any event be difficult to prove his liability, but the theoretical implications of such a case must nonetheless be considered.

4.39 The first thing to say about this case is that the concern that it, at first sight, very understandably generates is in reality about having a law against assisting crime *at all*; or at least, a law against assisting any crime that was to take place in the future, as opposed to the limited liability for immediate assistance of the old principal in the second degree.[504] In *any* case of assistance, and not just cases of inchoate assistance, the aider's act is complete, and culpable, once he has given the assistance, and it is for that that he is censured. In the

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[501] Criminal Attempts Act 1981, section 1(2),(3).

[502] *Shivpuri* [1987] AC 1, per Lord Bridge of Harwich, with whom the whole House agreed, at pp.20-21. Lord Bridge cited with approval paragraph 2.97 of the Law Commission Report on *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102 of 1980), in which we said: "If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible."

[503] As to these, see paragraphs 3.18-3.27 above. Commentators of authority, such as those cited in n. 479 to paragraph 4.16 above, have seen the creation of an inchoate offence of assisting as the obvious solution to these problems; and we are not aware of any other solution that has been suggested or would be feasible.

[504] See paragraphs 2.7 and 4.19 above.

case given in paragraph 4.38 above, D has done something that the law forbids, P has not.[505] Under the present law it is a matter of chance, so far as D is concerned, whether he becomes guilty, that chance depending entirely on whether P commits the principal crime. If D is convicted of accessoryship, his conviction will depend entirely on what he did at his house, and what his mental state was *then*, and not on what his mental state was when P was actually committing the principal crime. If, despite fulfilling all those requirements, D is exculpated because and only because P happens to be arrested on his way to the burglary, that would seem to be the irrational outcome. And it is hard to see that such an outcome has any fairness in it if one compares the position of D with another alleged accessory, D2, who may have provided the same help in exactly similar circumstances to P2 but, unlike D, is convicted because P2 did go on to commit a crime.

4.40 Second, there may be very different reasons why P does not commit the crime. He may succeed in not committing the crime because he is inefficient, or because he is prevented by outside forces from carrying out his plans. In such a case he is simply lucky, and has no moral virtue on his side. It is very difficult to see that there is any unfairness or irrationality in saying that D, who is also criminally culpable, should in that case still be proceeded against for the criminal act that he has already completed. Again, the irrationality is if anything that of the present law, that in effect says that because P has been fortunate, so must D be also.

4.41 However, there may be more respectable, principled, reasons why P does not commit the crime, since he may abandon his plans either through prudence or through remorse. Here again, however, there is no rational reason why D should also escape liability for his act of (inchoate) assistance, *merely because* P repents before committing the crime. Such a unilateral act on P's part does not count for merit on the part of D. But what if P's act is not unilateral, but the failure to commit the principal offence is brought about by an intervention on the part of D?

4.42 With a strict law of inchoate liability, such acts will not avail D, because his own crime will already be complete. Such concerns can, however, be accommodated, albeit with some recognition of the need to allow commonsense and social policy to prevail over the demands of strict logic, by providing a defence of withdrawal even in the case of an inchoate inciter.[506] Such defence as already exists in aiding and abetting[507] is already difficult to reconcile with the doctrinal basis of that offence, since even though an accessory's liability does not at present crystallise until the commission of the principal offence, the accessory may have done all that depends on him for liability well before that commission takes place; but nevertheless considerations of social policy have prevailed, in order to encourage repentance on his part.[508] We therefore consider in paragraphs 4.132ff below how such considerations should similarly be deployed in the case of the wider offence of assisting crime

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[505] *Spencer*, p. 159.

[506] *Spencer*, pp. 159-160.

[507] Draft Code, clause 27(8).

[508] See paragraph 2.96 above.

that we envisage. Such consideration will also enable the arguments in favour of a defence of withdrawal to be directed at the conduct that at present falls under the crime of incitement. Because incitement is a separate, inchoate, offence, withdrawal has never been thought relevant to it; but the policy arguments are just the same there as in the case of the assisting, or counselling, that falls under aiding and abetting.

Excessive width and vagueness

4.43 The other principal concern expressed about an offence of inchoate aiding is that, by removing the need to link the act of aiding to an actually committed principal offence, it will make the requirements for liability unduly vague and uncertain.

4.44 Such concerns are far from negligible. They have, however, to be confronted in the case of any inchoate offence, the clearest example of the working out of these general matters of principle being found in the law of attempt.[509] What is necessary is that the rules applying to accessory conduct in the future should be formulated with these issues of principle clearly in mind. That will mean in particular, and as in the law of attempt, that the mental element required for conviction is clearly defined; and that sufficient action, and not merely thought, on the part of the accessory will have to be established before a conviction can be obtained.

4.45 We have attempted to observe these principles when making the provisional proposals that follow for the general law of assisting and encouraging crime. We venture to suggest that an approach along these lines is more likely to produce a fair and effective system than is reliance, as a controlling factor, on the need to show the actual commission of the principal crime. It will not be overlooked in that connection that in at least one area of the present law, the *Bainbridge* type of cases, the requirement of commission of the principal crime has, far from producing certainty, in fact introduced substantial vagueness into the law because of the need, in order to catch cases of significant wrongdoing, to escape from the unreal straitjacket that that requirement imposes.

4.46 We therefore proceed to discuss the elements of the offence of assisting crime on the basis that that offence will be of an inchoate nature: that is, that it can be committed whether or not the principal crime assisted is itself committed. As we have made plain, we particularly seek the comment of consultees as to whether that is the right course to adopt. We also invite consultees who consider that the offence should not be placed on an inchoate basis to indicate how, if at all, that affects their view of the constituents of the offence.

ASSISTING CRIME

The physical element of the offence

4.47 The basic definition of the conduct to be controlled by this part of the law is somewhat simpler to state than the physical element of incitement or encouragement. In the Draft Code we used the expression "assist" as a basic and comprehensive term to indicate the form of

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[509] See paragraphs 4.34-4.36 above.

conduct sought to be controlled, which we did not think required, or indeed admitted of, definition or expansion. We pointed out that the word is used, and has not presented any difficulties of definition, in other penal statutes, notably in the offences of assisting in the retention of stolen goods under section 22 of the Theft Act 1968.[510]

4.48 We remain of that view; though we now invite comment, as in the Draft Code exercise we could not, as to whether "assisting" is a sufficient and satisfactory concept for use in defining this part of the law.

4.49 So stated, any act that assists the commission of crime will, subject to mens rea, itself be criminal. We recognise that that might be thought to state the law in dangerously wide terms;[511] but that such concerns would largely disappear if the mental element necessary for conviction as an assister were narrowly defined. This would be particularly the case if it were to be required, as in the case of the Model Penal Code,[512] that the assister act with the purpose or objective that a principal crime should be committed. This formulation would solve many of the (often hypothetical) cases that have caused concern[513] because it is difficult to see any legitimate objection to criminalising, for instance, a shopkeeper who sells a screwdriver to a known burglar if his *purpose* in so doing is that burglary should take place.

4.50 However, there are strong and legitimate reasons for thinking that liability for complicity in criminal activity should not be so limited: most obviously, that a person who acts in a fashion that he knows will assist in the commission of crime, without having the commission as his purpose, nonetheless behaves in a clearly anti-social fashion. This dilemma cannot be resolved without balancing the desirability of checking such behaviour; and the possible limitations that might be placed on a law that attached liability to knowing assistance; against the possibly very wide ambit of a law that punished all cases of knowing assistance.

4.51 However, the balance can only be struck after full consideration of the implications of a law that did not limit liability to those whose purpose is to facilitate the commission of criminal offences. The competing merits of the two approaches to the mens rea of an assister referred to in paragraphs 4.49-4.50 above are fully discussed below, and consultees' advice is sought on them. Here we are concerned with what should be the *physical* elements of the offence. It is desirable to consider those issues in their widest application, and thus, at this stage, to forego the luxury of solving the undoubted policy problems presented by some aspects of that question by recourse to a narrow definition of the *mental* element required for

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[510] Draft Code, clause 27(1)(a); Code Report, paragraphs 9.18-9.19.

[511] See paragraphs 3.10-3.13 above.

[512] Section 2.06(3)(a), discussed in paragraph 2.63, n. 196, above.

[513] In particular, the question extensively discussed by Professor Williams of whether a sale by a merchant in the ordinary course of business of an object known to be for use or possible use in committing a crime should be punishable: *Criminal Law: The General Part* (2nd edition), pp. 369ff; concerns attaching to the width of the term "assists" discussed in paragraphs 4.64-4.68 below; and indeed the concern about the position of the doctor on facts such as those considered in *Gillick*: see in particular paragraphs 2.61-2.62 above.

liability for assisting crime. With that approach in mind, we now discuss some particular aspects of "assistance".

Advice as assistance

4.52 To quote the commentary on the Draft Code, a person assists another to commit an offence when, for example, he supplies tools or labour or information to the principal, or when he does any other act which facilitates the offence.[514] "Assistance" therefore includes advice as to how to commit a crime, as well as aid in a more physical form. Such advice may of course also, and perhaps often, be construable as encouragement,[515] but in the present context we consider advice merely as a form of assistance.

4.53 There is little doubt that under the present law the provision of advice may constitute a form of aiding and abetting.[516] That law has been strongly criticised because it "gives too great an extension to criminal complicity. If the writer of the letter was guilty the first time his information was used, he would be guilty the *n*th time, which is absurd".[517] This problem is not limited to advice: multiple crimes by P, or others, with the same jemmy provided by D might be thought to pose the same problem. We doubt, however, whether in either case the problem is as extreme as is suggested: and in our view it is certainly not sufficiently difficult to justify the complete exclusion of the giving of advice from the category of assistance in crime.

4.54 First, some of the apparent oddity under the present law may stem from the requirement of regarding the accessory as a party to the crime actually committed, and thus as a party to each crime actually committed. Reason may feel strained by saying that D, by one piece of advice, "committed" a hundred burglaries. However, the offence to reason is caused by the treating of D as a party to the eventual principal offences, rather than inculpating him for his original anti-social act of advice. The reshaping of accessory liability

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[514] Code Report, paragraph 9.18.

[515] Cf the discussion of *Invicta Plastics v Clare* in paragraphs 2.130-2.131 above; *Spencer* p. 165, n. 65, discussing *McLeod and Georgia Straight Publishing Co Ltd* (1970) 75 WWR 161; and *KJM Smith* p.33, n.71.

[516] So held by Woolf J in *AG v Able* [1984] QB 795. The exact force of this case, which concerned the distribution by the Voluntary Euthanasia Society of a booklet describing means of committing suicide, is difficult to assess. The case took the form of an application for a declaration by the Attorney-General that the distribution of the booklet was a statutory offence under section 2(1) of the Suicide Act 1961, which concerns anyone who "aids, abets, counsels or procures the suicide of another". As the learned judge pointed out, at p. 807G, in order to avoid a usurpation by the civil court of the jurisdiction of the criminal courts, such an application could not succeed unless *all* circumstances in which the distribution might take place would involve an accessory offence. There might, however, be cases where it could not be proved that the distributor "intended the booklet to be used by someone contemplating suicide and intended that that person would be assisted by the booklet's contents, or otherwise encouraged to take or attempt to take his own life": [1984] QB, at p. 812D. Although couched in terms of "intention", this observation is perhaps limited to the need for awareness that the principal crime will or might be committed: see paragraphs 2.55-2.56 above.

[517] Williams, *Criminal Law* (2nd edition), p. 381, criticising *Baker* (1909) 28 NZLR 536, where D was held a party to a safebreaking because he had written a letter describing safebreaking techniques in general terms.

in inchoate form will ensure that liability is focused on that original act. Second, as Woolf J pointed out in *Able*, advice, to ground liability, must be given with the necessary mens rea: which, even if it does not involve purpose that the principal crime be committed, on any view will require at least awareness that that crime may be committed with the use of the advice.[518]

4.55 On that basis, therefore, we are unpersuaded (though we invite comment) that advice on how to commit crimes should not be included within the potential category of complicity by assistance. However, to treat information or advice as a category of assistance for the purpose of the law of complicity as is presently assumed to be the law, provokes two more general reflections on which it will be necessary to comment further. The first is that if we are concerned with inchoate assisting it is necessary to define carefully the alleged offence or offences in respect of which the criminal advice is proffered: in other words, to be certain that the conduct of P about which D advised was sufficiently identified as being criminal in nature. That is a general problem, for assistance in the sense of help as well as for advice, to which we return in paragraphs 4.57ff below.

4.56 Secondly, the social reasons for including mere advice within criminal facilitation may appear more obviously attractive in some cases than in others. Perhaps an extreme example is the contrast between terrorist manuals describing methods of creating explosions with the booklet published by the Voluntary Euthanasia Society.[519] However, accessory, and any other inchoate, liability is justifiable primarily because it assists and supports conduct that has been identified by the law as sufficiently anti-social to be categorised as criminal. It is not the obvious function of the law of accessory liability to discriminate, in terms of relative seriousness, between different forms of crime. However, we consider below whether there should be made available specific defences to exculpate those who provide assistance for criminal acts in circumstances that are, in general social terms, innocuous or of positive social benefit.

The offence assisted

4.57 As in the present law,[520] the principal offence relevant to accessory liability is to be identified according to the accessory's knowledge or belief[521] in respect of the principal's actions. We suggest that the offence assisted will be sufficiently identified if the accessory is required to know or believe, first, that the principal is committing acts that constitute the commission of a crime or intends to commit acts that, if carried through, would constitute

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[518] See the observation of Woolf J at [1984] QB 812D, cited and discussed in n. 516 above.

[519] Williams, *Textbook of Criminal Law* (2nd edition), p. 340, n. 11.

[520] See paragraph 2.55ff above.

[521] We discuss in paragraphs 4.76ff below whether the law should go further and require purpose on the part of the accessory as to the commission of the principal offence. We also discuss there the particular problem that arises in the "shopping list" case, exemplified in *DPP v Maxwell* [1987] 1 WLR 1350, discussed on this point in paragraph 2.73 above, where the accessory believes that the principal intends to commit one or other from amongst a number of specified offences, but does not know which particular offence is intended.

the commission of a crime; and, second, that his, the accessory's, acts assist or will assist the principal in the commission of that crime. A number of points arise on that formulation.

4.58 Where the crime is actually in progress at the time of the assistance, for instance in the common case of D keeping watch whilst P commits the actual burglary, the identification of that crime will not cause difficulty. Where the principal crime is in the future, it would in our view be unreasonably restrictive to require knowledge or belief on the part of D in all the detail that would be necessary in order to indict the principal crime. In particular, it should not be required that D can necessarily state the time or place of the principal crime, or identify its victim. However, he should be shown to have known or believed P's future course of action in sufficient detail for it to be possible in charging him to identify the branch of the criminal law that P's conduct would infringe. Thus, if P asked D to supply him with gelignite, or to drive him to a particular location, D must be shown to have believed that P intended to use the gelignite, or to engage at the location in conduct that would in law amount to, for example, "burglary", "unlawfully causing an explosion", "murder" or "unlawful wounding". If a principal crime cannot be identified in that way, in our view it makes the law too imprecise to retain the possibility of accessory liability. Without identification of the principal crime, suppliers and assisters would be liable to be convicted simply on the basis of a belief on their part that the other party was going to do something unlawful, but they did not know what.

4.59 We have spoken above in terms of the legal category into which the principal's acts fall. The accessory need not, of course, know what that legal category is, or the reasons in law that make the principal's conduct criminal, any more than the principal himself need know that his conduct is illegal. What the accessory has to know or believe are the facts that do or would constitute the commission of a crime by the principal.

4.60 Those facts include, except in the case of an offence of strict liability on the part of the principal, the mental state or mens rea necessary for conviction of the principal crime. Again, that will normally not give rise to any difficulty. Where the crime is in the actual course of commission at the time of the assistance, P's state of mind should be clear to D. Where assistance is given in advance, D will be inculpated according to his understanding of P's future intentions; so in the normal case he will only be inculpated where he understands that P will intentionally commit a criminal act. There might, however, be cases where D knew that P intended to commit the actus reus of a crime, but mistakenly believed in the existence of circumstances that would make P's act non-criminal. In such cases D should not be liable for complicity. Examples are:

P asks D to keep watch outside a house which P was to enter to retrieve goods which, P falsely told D, belonged to P himself. D therefore believed that P's removal of the goods would be honest and thus, in law, not theft.

D sees P fighting with X. D holds down Y, a friend of X, in order to prevent his restraining P. D believes, wrongly, that P is acting in reasonable self-defence, so that on the facts as D believes them to be P would be committing no crime.

D provides a pass that entitles P to gain access to a public building. The pass is, unknown to D, a forgery. In presenting the pass P would commit an offence under section 3 of the

Forgery and Counterfeiting Act 1981 if he knew or believed the pass to be false. P knows of the forgery, and thus commits the offence, but the state of D's knowledge is such that he believes P to be innocent.

P and D are babysitting in X's house while he is out for the evening. P informs D that she wishes to borrow a book belonging to X, which is on the top shelf and can only be reached by D. D gets the book down for her, and she puts it in her bag. While D believes that she will bring the book back after she has read it, P actually intends to keep it permanently.

4.61 We have spoken above of "the principal", who will normally be a particular person identified by name by D. We do not, however, think that that should be a necessary precondition of liability. We may give an example adapted from the facts of the conspiracy case of *Hollinshead*.[522] D1 manufactures devices for use in defrauding the electricity authorities, which he knows can only be used for that purpose. He supplies them to D2, expecting and intending that D2 should sell them to people who wish and intend to use the devices for that dishonest purpose. In that case D1 believes that the ultimate purchasers will commit the criminal offence by use of the boxes, and knows that the boxes will assist in the commission of that offence. He does not know who the principals will be; but he knows that they will exist, since they are the only "market" for his boxes. In such a case, provided, importantly, that the requirements of knowledge and belief on the part of D1 are fulfilled, it would seem entirely right that he should be convicted of assisting, even though he cannot specify the names of the ultimate offenders, or when exactly they are going to commit their offences.

4.62 Where the principal offence is one of strict liability, the only factor that the accessory has to be aware of, in order to be aware of the existence of the principal offence, is the commission by the principal of the forbidden act: because the definition of the principal offence consists of the commission of that act, and no more. That has given rise to some discussion as to whether, when one is considering the mens rea of the accessory, something less than knowledge or belief in the forbidden circumstances on his part should be sufficient to convict him of accessoryship.[523] We discuss that question further, as part of our consideration of mens rea issues, in paragraph 4.89 below.

4.63 The need to identify the principal offence, together with the possibility of liability on an inchoate basis,[524] will resolve the *Bainbridge* problem. Where a principal offence other than that expected by D is committed by P, the question will be whether, at the time at which D gave his assistance, any future offence was sufficiently identified as the object of that assistance. That we suggest to be a more precise, and fairer, basis on which to convict D than the erratic comparison of the expected and the actual conduct of the principal that the present law forced on the court in *Bainbridge* itself.[525]

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[522] [1985] AC 975.

[523] The issues are most clearly set out in *KJM Smith*, pp. 191-193.

[524] See paragraphs 4.18ff above.

[525] See paragraph 2.71 above.

A de minimis *principle for assistance?*

4.64 To say that *any* act of "assistance" is *prima facie* sufficient to ground liability opens the prospect of such liability in cases where the assister's contribution might be thought very slight: "for example, a prosecution for facilitating an offence of Sunday trading by giving a shop assistant a lift to the illegally open DIY on a rainy Sunday".[526] Like Mr Spencer, we do not favour the avoidance of the apparent oddity of that outcome by limiting the assistance (or indeed the encouragement) offences to indictable or otherwise "serious" offences. If certain types of "assistance" are not sufficient to incur criminal liability, that should be so irrespective of the nature of the criminal conduct perpetrated.[527] Moreover, the example has force not so much because it relates to a principal activity which not everybody thinks it wise to criminalise, but, more pressingly, because the act of assistance seems remote from the actual commission of the principal crime. Thus, it is not the shop assistant, but the supermarket chain who are his employers, who make the sales that breach section 47 of the Shops Act 1950. The employers will no doubt open for business, albeit with marginally less convenience and efficiency, and make illegal sales, whether or not this particular assistant arrives for work; and many other factors, including cooperation by suppliers of services and of the goods to be sold, not to mention the presence of customers,[528] are necessary before the prohibited supply can take place.

4.65 The possibility of what might be acts incidental to or remote from the commission of the principal offence attracting accessory liability appears to have been one of the reasons[529] for the original draft of the Model Penal Code having required that an accessory's acts should have *substantially* facilitated the commission of the principal offence.[530] This expression or, we would think, any similar expression seeking to introduce the same type of limitation raises difficult issues of judgement, not least because it is not possible to require a causal connection between the act of assistance and the commission of the principal crime.[531] There are also difficult issues of policy: in particular in the assumption that some actions that as a matter of fact assist in the commission of crime can nonetheless be excused as insignificant. It would seem to be considerations of this sort that led the American Law

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[526] *Spencer*, p. 162.

[527] See paragraphs 4.171-4.173 below.

[528] Under the present law shoppers who know that it is Sunday, or pub customers who know that the landlord is selling them beer after the permitted hour, are plainly aiding and abetting, because they know the facts that constitute the principal offence and, because it takes two parties to make a sale, are assisting in its commission. Such persons would not, however, expect to be prosecuted, and we propose specific provisions to exempt them from the offence of assisting crime that will take the place of aiding and abetting: see paragraphs 4.101ff below.

[529] The other, and perhaps more pressing, reason for concern was reluctance to convict of accessoryship one who acted in the ordinary course of business to provide materials that he knew were in fact going to be used for criminal purposes. We discuss that issue further in paragraphs 4.113-4.116 below.

[530] Tentative Draft No. 1, section 2.06(3)(b).

[531] See paragraphs 2.17-2.18 above.

Institute to abandon the requirement of substantial facilitation of the principal offence in favour of the simple giving of aid in its commission.[532]

4.66 It should be noted, however, that that change in the MPC formulation took place at the same time as the MPC adopted the requirement that D should have had the *purpose* of promoting or facilitating the commission of the principal offence.[533] This is therefore yet another case where restriction of the ambit of complicity to acts of the complicitor done with the purpose that the principal crime should be committed would solve a problem of excessive width of the law.[534] Where it is D's purpose in giving assistance that the principal crime should be committed, he cannot legitimately claim to be exculpated on the ground that his assistance was in the event not substantial.

4.67 A final decision on the present point can perhaps, therefore, only be taken in the light of the discussion of whether purpose, or merely awareness, should be the mental requirement for complicity. The potential width of a physical element in an offence of complicity stated only in terms of assistance is clearly a material factor in that debate. Even, however, if it were to be concluded that awareness that conduct will be of assistance should indeed be sufficient to create liability in the offence of complicity,[535] it might still be considered that *any* conduct that is legitimately described as assisting the commission of a crime should come within the reach of this offence. We however invite comment on that point, and on whether the definition of "assistance" should be qualified to apply only to "substantial", "material" or other limited types of assistance.

4.68 A case which requires particular attention is where the assistance is remote from the commission of a principal crime, for example where D assists someone who is himself merely committing an accessory or inchoate offence. To adapt the example given above, this would occur if D gives a lift to work to an employee of a company supplying goods to the supermarket trading illegally on Sunday. There are in our view good reasons of policy why generally such cases should not attract criminal liability. Since those reasons reach more widely than problems about the definition of "assistance", the issue is discussed separately in paragraphs 4.180-4.184 below.

Omissions as "assistance"

4.69 Is there, and should there be, an offence of assisting the commission of a criminal offence by a mere omission? In the Draft Code the Commission considered that the present law could not be stated less broadly than that

> Assistance or encouragement includes assistance or encouragement arising from a failure by a person to take reasonable steps to exercise any authority or to discharge

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[532] MPC, section 2.06(3)(a)(ii).

[533] MPC, section 2.06(3)(a): see paragraph 4.49 above.

[534] Cf paragraphs 4.49-4.50 above.

[535] See paragraph 4.99 below.

any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence.[536]

4.70 This formulation merely states the type of conduct that can potentially amount to assistance or encouragement, if as a matter of fact the conduct has that effect. It does not state that failure to exercise authority necessarily makes a person in authority an accomplice.[537] Nevertheless, we are satisfied that it is unsatisfactory as a statement of a reformed law of complicity. In the Draft Code it was necessary to reproduce the structure of the present law in which, within the general category of "aiding and abetting", assistance and encouragement are simply two different forms of what is, in law, the same activity, each therefore governed by exactly the same rules. It is however clear that passivity and omission have very different implications according to whether they are considered as a form of assistance, or as a form of encouragement.

4.71 "Assistance", in the normal sense that we think the word should be given, extends to any conduct on the part of D that, as a matter of fact, makes it easier for P to commit the principal offence. We do not think that that concept will be difficult to apply in cases where the alleged assistance consists of positive conduct on D's part: supplying tools for use in the principal crime; giving advice on how to commit a crime; driving P to the scene of the offence; or positively misleading or obstructing the police or other law enforcement agents. However, if that legal category of assistance can include "conduct" consisting of a merely passive failure to act the obligations placed on D appear to be uncertain of definition; unreasonably wide; and inconsistent with other principles governing the criminal law.

4.72 Those objections can be illustrated from the statement of the present law contained in clause 27(3) of the Draft Code. The duties there referred to may not even be confined to legal, rather than merely social or moral, duties. But even if the duties referred to are so confined, it would seem to follow from the citizen's general, if somewhat undefined, duty to assist the police,[538] or at least from the citizen's undoubted authority to use such force as is reasonable in the prevention of crime,[539] that any failure on the part of D to intervene to prevent the commission of a crime by P would convict D of complicity in that crime. And, in more specific cases, D can find himself obliged, in order to avoid an accusation of assisting the commission of an offence, to take very positive action. The clearest example is perhaps *Tuck v Robson*,[540] where a landlord was convicted of aiding and abetting his customers to consume liquor after permitted hours. He had called "time", and asked the customers to leave, but there was held nonetheless to be "passive assistance in the sense of presence with no steps being taken to enforce his right either to eject the customers or at any

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[536] Draft Code, clause 27(3); Code Report, paragraphs 9.22-9.23; and see paragraphs 2.23-2.30 above.

[537] See paragraph 2.29 above; Cf Williams, [1990] Crim LR at p. 781.

[538] Nicolson, [1992] Crim LR 611.

[539] Criminal Law Act 1967, section 3(1).

[540] [1970] 1 WLR 741.

rate to revoke their licence to be on the premises."[541] It is doubtful whether the landlord was under any duty to eject his customers, apart from that imposed ex post facto by the law of complicity. However, he clearly had "authority" to remove them, based on his control of the premises; as the car-owner in *Du Cros v Lambourne*[542] had authority, based on his ownership, to require the speeding driver of the car to slow down. In each case it would seem that failure to exercise, or rather to attempt to exercise,[543] that authority was enough to convict D as an assister.

4.73 Some of the uncertainty of the law turns on whether, in these and similar cases, D's conduct can naturally be described as "assistance" at all. However, the natural meaning of that word does not exclude cases of inaction; and if (as we provisionally propose)[544] the general law should require only awareness on the part of the defendant of the assisting nature of his conduct, then many cases of inaction would *prima facie* fall within this offence. A general law of complicity that extended to merely passive assistance would, however, be burdensome, because it would place obligations of law enforcement on those who, under rules of law completely unconnected with the crimes in question, had a duty or even merely authority to act to impede the commission of a principal crime. The law importantly recognises that restraint should be exercised in imposing criminal liability for a mere omission, though opinion differs as to how far and on what basis that restraint does and should extend.[545] It would however seem reasonable that that restraint should in particular be exercised when determining the limits of liability for an inchoate offence.[546] Our judgement, on which we invite comment, is therefore that a general offence of assisting crime would be extended too far if it were applied to cases where the accused had afforded "assistance" in the commission of a principal crime simply by failing to discharge a duty or exercise an authority that, if acted on, would or might have prevented the commission of the offence.

4.74 Nor do we see, any more than did the Commission when formulating the Draft Code, any way of reasonably limiting liability for "passive assistance" to a specific range of

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[541] [1970] 1 WLR at p. 746.

[542] [1907] 1 KB 40.

[543] All that seems to be required by *Tuck v Robson* and *Du Cros v Lambourne* is some demonstration of authority on the part of D, albeit perhaps in violent form: physical ejection of the drinkers, or even retaking the wheel of the car. There however is not, nor could there be, a requirement that D should succeed in preventing, or at least terminating, the commission of the principal offence. That creates some difficulty in saying that D, if he does not take the required steps, has assisted in the commission of that offence, since he is not required to do anything that in fact prevents the offence from occurring.

[544] See paragraphs 4.76ff below.

[545] See for instance Ashworth, (1989) 105 LQR 424; Williams, (1991) 107 LQR 86.

[546] Cf *Ashworth*, p. 392, who points out that the current law as to liability for complicity is one area in which, perhaps paradoxically, the courts have forgotten their general reluctance to impose liability for omissions. Cases like *Tuck v Robson* and *Du Cros v Lambourne* are in his view "a bold step towards omissions liability under the camouflage of the law of complicity."

cases.[547] The general objections to this head of liability are in our view too great, and the number of cases in which it would be even arguably desirable to enforce it are too few,[548] for attempts to produce a limited version of passive assistance to be justifiable. We therefore provisionally conclude that the offence of assisting in the commission of crime should be limited to positive acts of assistance on the part of the accused.

4.75 "Encouragement" raises different issues. As we will indicate below, encouragement is by its nature limited to cases where it is the object or intention of D that P should commit the principal crime; and in such cases it is much more clearly arguable that any conduct properly described as encouraging or stirring up P to the commission of crime should fall within the law of complicity, even though the encouraging conduct consists of what might be characterised as mere omission on D's part.[549] We will therefore return to this issue when we consider the separate head of complicity liability, based on encouragement rather than assistance, that we discuss in paragraphs 4.143ff below.

The mental element of the offence

Purpose or awareness?

4.76 The controversy in the present law as to whether the accessory must have the commission of the principal crime as his purpose has been discussed at length earlier in this paper.[550] On the basis of that discussion, the issues for the future structure of the law can be dealt with comparatively shortly; bearing in mind that we are here concerned only with assisting, and not with encouraging, the commission of crime.

4.77 If D had to have as his purpose the commission of a crime by P, many of the concerns that have been expressed as to the possibly excessive width of a law of complicity would resolve themselves. Thus, if D provides P with a jemmy with the purpose that P should

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[547] Code Report, paragraph 9.23.

[548] In many of the cases the "accessory" commits an offence of his own, for instance, of obstructing the police: provided, for that offence, that he does a positive and not merely a passive act (*Rice v Connolly* [1966] 2 QB 414 at p. 419). But where D by a failure to act commits no other offence, it would seem wrong to use the law of complicity to make his inaction criminal. Thus in *Tuck v Robson*, discussed in paragraph 4.72 above, the landlord had to be charged with complicity in the *customers'* after-hours drinking because the only offence on the part of a landlord created by section 59(1) of the Licensing Act 1964 was that of *selling* liquor out of hours; there was not, and still is not, any specific offence of permitting the *consumption* of liquor out of hours. If Parliament, for whatever reason, had seen fit not to create a specific offence of permitting or allowing such consumption, it is difficult to see that there can be a pressing social need for the extension of the crime of complicity to omissions to exercise authority over property in order to try to achieve that same result. These arguments are expanded on, with great force, by Williams, [1990] Crim LR at pp. 785-786.

[549] Cases like *Tuck v Robson* and *Du Cros v Lambourne* prevent one from concluding that it is the present law that in every "omission" case there must be proof of encouragement and not merely of assistance: compare clause 31(3) of the Code Team's Bill, Law Com No 143 at p. 188, with clause 27(3) of the Draft Code.

[550] See paragraphs 2.63-2.69 above.

commit a burglary using it;[551] or D permits an overloaded lorry to leave his premises because it is his purpose that it should be driven on the road, and not merely because he wants to sell more coal with complete indifference to what happens to the coal or how it is transported;[552] or a doctor provides contraceptives to a fifteen year old girl for the purpose of removing her lover's inhibitions from intercourse, and not merely as a precaution against pregnancy should that intercourse occur;[553] then there is unlikely to be concern on policy grounds about any of those defendants being convicted of complicity. Somewhat similarly, even if D's assistance seems of only minimal help towards the commission of the principal crime,[554] doubts about convicting D of complicity are likely to be stilled if that assistance was given with the purpose of bringing about the commission of the crime.

4.78 However if, as is the present law,[555] all that is required is awareness on the part of D that his acts might assist in the commission of the principal offence,[556] then the law of complicity reaches a wide variety of activities, some at least of which might not instinctively be thought appropriately visited with criminal liability.[557]

4.79 The choice between these two differing approaches is one of policy, on which we seek the views of consultees, and on which we do not think it appropriate, at this stage, to express any concluded opinion. However, in seeking those views we venture to draw attention to some considerations that we think relevant to the decision.

Should indifference to the commission of crime excuse?

4.80 First, to limit liability to cases where it was the accused's purpose to promote the commission of the principal crime would, necessarily, exclude cases where the accused knew that he was in fact assisting the principal in the commission of a crime, but was merely indifferent as to whether or not that crime was in fact committed. That would mean that, in particular, one who supplied goods or services that he knew were to be used in crime, but did so purely for the motive of gain and not specifically to promote the commission of the crime, would himself commit no offence. It is far from obvious that that outcome is correct, either from the point of view of justice or from the point of view of social protection. It might well be thought that those who willingly and knowingly assist in crime should be liable to punishment, not least as some means of impeding the commission of the crimes that they

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551 *Lomas* (1913) Cr App R 220.

552 *NCB v Gamble* [1959] 1 QB 11, discussed in paragraphs 2.66-2.67 above.

553 *Gillick* [1986] AC 112, discussed in paragraphs 2.57-2.60ff above.

554 Cf paragraphs 4.64-4.68 above.

555 See paragraphs 2.55ff.

556 See for instance McCullough J in *Blakely and Sutton* [1991] RTR at p. 415J, cited in paragraph 2.55 above.

557 See for instance the examples cited, from the exposition of the reasons for the imposition of a "purpose" requirement in section 2.06(3)(a) of the Model Penal Code, in n. 196 to paragraph 2.63 above.

would otherwise assist in; and that they act for profit should hardly be a reason for excusing them.[558]

Special cases to be excluded?

4.81 Second, a law based on mere awareness of the criminal intentions of the principal would necessarily encompass some at least who acted not in order to promote their own interests but for higher purposes. Those cases may, however, be accommodated by providing specific defences in particular cases of assistance. Some such defences have been suggested, though with uncertain status and in uncertain terms, under the present law. We review below what specific cases might be exempted from liability under a law of assisting that went wider than cases of purpose on the part of the accomplice, and how those cases might be defined. We invite comment not only on the defences so formulated, but also on whether, if those and perhaps other defences were available, a general test of liability, based more broadly on awareness rather than purpose, might be more acceptable.

The test of knowledge or belief

4.82 Third, if the test for the mental element of the assisting offence is to be broader than purpose that the principal offence be committed, that test must be defined with some care. We consider that the law would in any event be too broad if it were formulated in terms of, or in terms that could be interpreted as requiring only, suspicion as to the principal's intentions. That consideration is particularly relevant to supply of assistance "in the ordinary course of business": for instance, the sale of a screwdriver or the provision of a taxi ride to a person known or thought to be a professional burglar. In such a case, D may well legitimately suspect that P will use the assistance given to him in one of his burglaries; but it seems too restrictive of ordinary activities to make supply criminal on the basis simply of *suspicion* of the use to which the supply is to be put.

4.83 We accordingly suggest that if the law were to be formulated in terms of "awareness" the test should be that the accessory knows or believes that the principal is using or will use the assistance in the commission of a crime.[559] "Knowing or believing" is a concept already familiar in the law from its use to describe the necessary state of mind of a person charged with handling stolen goods under section 22 of the Theft Act 1968.[560] It has been

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[558] These policy considerations are set out by Mr Spencer: "The first not-so-bright idea is that liability for facilitation should be limited to those who furnish help desiring the crime to be committed, leaving out all those who do not so desire. The difficulty, however, is that where someone supplies tools or equipment to a criminal in return for cash it is most unlikely that he will actually *desire* any crime to be committed. Such a person is unlikely to care whether the offence is committed or not as long as he gets his money. Indeed, as his part in the affair is less likely to be detected if the crime he tried to help is not committed, he may well hope that it is not. Thus a crime of facilitation so limited would miss many of the cases where it is particularly needed". *Spencer*, p.162.

[559] "Crime" being identified in the manner explained in paragraphs 4.57-4.62 above, and including the mental state on the part of the principal that is necessary for his conviction.

[560] "A person handles stolen goods if...knowing or believing them to be stolen goods he dishonestly receives the goods..."

stressed, admittedly after some different and more elaborate approaches to that section,[561] that "knowledge or belief" are words of ordinary usage, which in normal circumstances can be simply applied by the jury without further elaboration.[562] This branch of the law also recognises that mere suspicion, or the presence of suspicious circumstances, does not suffice to establish the existence of belief.[563]

4.84 The belief that, in complicity by assistance, the accused must be shown to hold is that the principal crime will, not merely may, be committed: because a belief as to a future possibility collapses into mere suspicion.

The practical effect of the "belief" test

4.85 It may be objected that to require belief, rather than merely suspicion, on the part of an accessory encourages the turning of a blind eye to criminality, or may exculpate those who ignore the obvious. That, of course, is very much the other side of the coin from the contention that only those whose purpose is the commission of the principal offence should be convicted of complicity. However, the reality is that suspicious circumstances known to the accused are evidence of belief, particularly if the accused enters into transactions in such circumstances on a number of occasions; and where such an accused is a willing and regular supplier of assistance in criminal activities juries can be relied on to deal realistically with claims that he suspected, but had no belief about, the use to which his assistance was to be put. To quote a commentator from another jurisdiction: "The person most likely to be caught by this part of the law is the recurrent supplier in suspicious circumstances, and there is no reason why he should not be".[564] The belief test will, however, exclude from liability for complicity those who conduct ordinary businesses, even with suspect customers, and that again is in our view a proper limitation on the law.[565]

4.86 We would also suggest that the operation, and the benefits, of the belief test are easier to appreciate when it is remembered that the offence of complicity that we propose will be inchoate in nature, complete once the act of assistance is done.[566] Under the present law, when the issue of complicity only arises for consideration if the principal crime is actually committed, the accessory's mental state has nonetheless still to be assessed at the moment when he actually provides the assistance. That concentration on the commission of the

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[561] See *Archbold* (43rd edition, 1992), paragraph 21-244.

[562] *Harris* (1987) 84 Cr App R 75 at p. 78, per Lawton LJ. "Belief" is particularly appropriate in respect of crimes to be committed in the future, because it is not, as a matter of logic and of language, possible to *know* future events.

[563] *Moys* (1984) 79 Cr App R 72. *Hall* (1985) 81 Cr App R 260, at p. 264.

[564] Howard, *Australian Criminal Law* (1st edition), p. 229. This view entails, in our opinion realistically, that it would be open to the prosecution to give evidence of previous transactions engaged in by the alleged accessory.

[565] See further on this last point paragraphs 4.113ff below.

[566] See e.g. the formulation of Professor J.C.Smith, cited in n. 479 to paragraph 4.16 above.

principal crime may, however, make it all too easy to assume that, at the earlier stage of providing what proved in the event to be assistance towards the commission of a crime, the accessory must have known that that crime would be committed. We venture to suggest that, under an offence that looks only at facts existing at the time of the provision of the advice, materials or other help, it is easier to see that the accused must be judged according to his mental state at that time; and that, broadly put, his fault is based on willingness to assist in the commission of crime, whether or not in the event a crime is actually committed with the assistance that he provides.

The "shopping-list" case

4.87 A test couched in terms of purpose that a particular crime should be committed, and a test in terms of belief that a particular crime will be committed, both equally fail to catch what has been described as the "shopping list" case, exemplified by *DPP v Maxwell*,[567] where the accessory knows or believes that his actions will assist in the commission of one of a number of possible crimes, but he does not know which one. In *Maxwell* itself, the accused had driven members of a terrorist organisation to premises of a person to whom they were opposed, knowing that some form of terrorism was to be perpetrated there, but not knowing whether it was intended to be damage by bombing to the premises, murder of the occupiers, or lesser assaults upon them.

4.88 It would in our view make unduly vague the definition of the "offence" that the accessory has to contemplate[568] if this case were sought to be contained within a single formula covering all cases of accessory liability. If this were done the accessory would only be required to believe that there was to be committed acts that would be "criminal", without having to show any belief on his part as to the specific characteristics of those acts that would make them criminal. We therefore consider that special provision should be made for cases such as *Maxwell*. The basic test should remain that the accessory knows or believes that his conduct will assist the principal in the commission of a specific crime.[569] However, the accessory should also be liable where he knows or believes that his conduct will assist the principal in the commission of one of a number of such specific crimes, but does not know in which of those specific crimes his assistance will in fact be used.

The principal's mens rea: a special rule for crimes of strict liability?

4.89 We referred in paragraph 4.62 above to the issue, much debated in theoretical discussions of the present law, of whether in the case of offences of strict liability the rule should be relaxed that the accessory must, at the least, believe in the present or future existence of the elements constituting the principal offence.

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[567] [1987] 1 WLR 1350: see paragraph 2.73 above.

[568] As to which, see paragraphs 4.57-4.62 above.

[569] See paragraphs 4.58 and 4.83 above.

4.90 The case round which discussion traditionally centres is *Callow v Tillstone*.[570] A butcher relied on a certificate of fitness for human consumption given negligently by a veterinary surgeon, and offered unsound meat for sale. He was found liable for the (strict liability) offence of exposing unsound meat for sale, but the surgeon's negligence was insufficient to incriminate him as an abettor in the sale. It has been strongly argued that it is unjust and anomalous, and an impediment to the effective implementation of the social policy that lies behind the creation of strict liability offences, if a negligently culpable secondary party, who could be regarded as primarily responsible for the actions of the principal, may go unpunished. To avoid that anomaly, it is argued, negligence on the part of the accessory should suffice for his conviction.[571]

4.91 We invite comment on this suggestion, but for our part we see difficulties in developing the law in that manner. That is principally because caution should be exercised in creating offences of negligence, which in our view have to be justified on the basis of a careful analysis of the social and law enforcement need for imposing such liability in the particular circumstances of each case. Such assessment is, of necessity, precluded by the imposition of a rule of negligence liability that extends over all offences of strict liability, whatever the status and role in those offences of the accessory. It is also quite unclear why, if law enforcement requires the imposition of negligence liability on accessories to crimes of strict liability, that rationale should not extend also to mens rea crimes. Those crimes, as a category, are to be presumed to be at least as deserving of deterrence by stringent rules of accessory liability as are principal crimes of strict liability. If the approach of the present law to accessory responsibility in strict liability offences is thought to create anomalies in particular cases, those anomalies are in our present view more appropriately cured by the imposition of express and limited liability, as *principals*, on those who are culpably involved in activities that have been prohibited by statute.

The alternative: "purpose" as the mens rea of assisting crime

4.92 The foregoing paragraphs assume that knowledge or belief as to the principal's present or future commission of the crime assisted should suffice to convict of the offence of assisting crime. There is, however, a different possible view.

4.93 If accessory liability were to attach only in cases where it could be shown that the assister's *purpose*[572] in giving help was that the principal crime should be committed, then, as we pointed out in paragraph 4.77 above, many of the objections, on grounds of potentially excessive width, to an offence of assistance would fall away. Thus, it is difficult to think that there would be serious objection to a rule that forbade even minor assistance towards a

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[570] (1900) 83 LT 411.

[571] *KJM Smith*, pp.192-193.

[572] It would not necessarily be required that the commission of the principal crime was the accused's *sole* purpose. D, a shopkeeper, might for instance seek and have as his object the commission of a burglary by P to whom he sold equipment for cutting bolts, as well as wanting to pocket the purchase price. However, under the approach here under consideration, it would have to be shown by the prosecution that D indeed had the former purpose and objective, whatever other interest he may have had in the transaction.

criminal end;[573] or which forbade a doctor from providing contraceptives that might assist in unlawful intercourse; if in both cases the defendant had acted with the purpose of bringing about the commission of the crime. The law would also be made simpler: because if it is a precondition to liability that the accused must have the commission of the principal crime as his purpose[574] there would be little justification or need for the special defences that exempt difficult cases from the general rule of liability on the grounds of mere knowledge of or belief in the principal's criminal intentions.[575]

4.94 A further argument in favour of limiting the offence of assisting crime to cases where it is the accused's purpose that the principal offence should be committed is that that might make it appear more acceptable to place the offence on an inchoate basis.[576] It may simply seem more acceptable that defendants, for instance in the examples suggested in paragraph 4.32 above, should be convicted of assisting when the principal crime has not been committed if they gave their assistance with the purpose that that crime should be committed, and not merely in a state of knowing indifference as to whether the principal crime took place or not.

4.95 We therefore specifically invite comment on whether the offence of assisting crime should be limited to cases where it is the assister's purpose that the principal crime should be committed.

4.96 It will be appreciated that such a rule would exclude from liability many cases where there might be thought to be strong reasons for the law to intervene. For instance, the regular supplier of goods or of transport who well knows that they are to be used for criminal purposes, but is merely interested in making a profit on the sale;[577] or, more generally, commercial suppliers who would positively prefer the completed crime not to take place, so long as they obtain payment, since that may make their part in the affair less likely to be detected.[578]

4.97 We invite comment on whether, if such cases were to be excluded from liability by a general "purpose" rule, there should nonetheless be special provisions that inculpated some of the assisters referred to in paragraph 4.96 above albeit that they could only be shown to have acted in the knowledge or belief that crimes were being or would be committed. The identification of the appropriate categories for such a rule, and the justification of imposing

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[573] See paragraphs 4.64-4.68 above.

[574] We use the term "purpose" as being less open to misunderstanding than "intention". However, it is very doubtful whether there is in truth any difference in meaning between the two terms, since it is now accepted that "intention" in law naturally and properly means "purpose": see eg Lord Simon of Glaisdale in *DPP v Morgan* [1976] AC 182 at p. 217D and *DPP v Majewski* [1977] AC 443 at pp. 479H-480A, and Lord Goff of Chieveley (1988), 104 LQR at pp. 42-43. We recognised these developments in the definition of "intention" in terms of purpose proposed in clause 2(a) of the Bill annexed to LCCP 122.

[575] See paragraph 4.81 above and, in much more detail, paragraphs 4.100-4.142 below.

[576] Cf paragraphs 4.29-4.45 above.

[577] See the example cited in paragraph 4.85 above.

[578] See paragraph 4.80 above.

liability in those categories rather than others, is a matter of some difficulty. For instance, the liability might be limited to those who provide what could be "equipment" for use in crime; or to those who provide transport to the scene of a crime; or to those who do any act for gain or reward. We do not ourselves see any of those categories as self-evidently standing out from acts of assistance generally, and foresee some considerable problems of legislative definition. However, we invite comment from those who reject the general test of knowledge or belief on the part of the accessory as to whether they consider that it would be desirable, and practical, to adopt that test in any, and if so what, special categories of assistance.

4.98 We have already pointed out that if "purpose" that the principal crime should be committed were to be adopted as the general test for liability on the part of an assister, then it will not be necessary to consider many of the further rules, and in particular the provision of special defences, that are thought to be required by the "knowledge or belief" test.[579] In order to enable discussion of those latter rules, therefore, it will be convenient if we proceed from this point on the basis of the knowledge or belief test; while not forgetting that we particularly invite comment on whether that test is correct.

Our provisional definition of the offence of assisting crime

4.99 We hope that it may assist readers in critically reviewing the discussion in this section if we set out in something like statutory form the basic definition of the offence that results from it. We suggest

> "(1) A person commits the offence of assisting crime if he
>
> (a) knows or believes[580] that another ("the principal") is doing or causing to be done, or will do or cause to be done, acts that do or will involve the commission of an offence by the principal; and
>
> (b) knows or believes that the principal, in so acting, does or will do so with the fault[581] required for the offence in question; and
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> (c) does any act[582] that he knows or believes assists or will assist the principal in committing that offence.
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> (2) Assistance includes giving the principal advice as to commit the offence, or as to how to avoid detection or apprehension before or during the commission of the offence.[583]

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[579] On this point, see paragraph 4.93 above.

[580] See paragraphs 4.76-4.86 above.

[581] This excludes cases in which the defendant believes in the existence of facts that would render the principal's conduct innocent, as discussed in paragraph 4.60 above.

[582] This confirms the exclusion of any general *de minimis* principle: see paragraphs 4.64-4.68 above.

[583] See paragraphs 4.52-4.56 above. The element in the provision that relates to advice as to evasion of detection is limited to advice as to such evasion before or during the commission of the principal offence. Once that principal offence has been committed the adviser becomes an accessory after the fact, to be dealt with under

(3) A person does not assist the commission of an offence for the purposes of this section if all that he does is to fail to prevent or impede the commission of that offence.[584]

(4) "Offence" in sub-paragraphs (a)-(c) of sub-section (1) above means the breach of a specified prohibition laid down by statute or the common law; but, provided the defendant knows or believes sufficient facts to show that such a breach is taking place or will take place, he need not know the time, place or other details of the offence.[585]

(5) A person also commits an offence under this section if he knows or believes that the principal intends to commit one of a number of offences and does any act that he knows or believes will assist the principal in committing whichever of those offences the principal in fact intends."[586]

Defences to an offence of assisting crime

4.100 The normal "general" defences, applying throughout the criminal law,[587] will apply also to this offence. In this section we consider rather what defences or, perhaps more accurately expressed, exemptions from liability ought to be provided in the specific case of criminal assistance. As we have already observed, such exemptions are most likely to be thought necessary if the general definition of such an offence includes all cases where the provider of assistance does so in the belief that the principal is committing or will commit a crime. Within that general rule, different considerations may apply in those cases where the accessory's purpose in providing his assistance is to bring about the commission of the principal crime. We deal specifically with such cases in paragraphs 4.138-4.140 below. Many of the issues have already been raised in our discussion of the present law.

Persons involved in statutory offences[588]

4.101 The present defence, based on *Tyrrell*,[589] is very uncertain in its content, but it would seem to be limited to those who, although technically aiders and abettors of a statutory offence, can be identified as the "victim" intended to be protected by the enactment creating the offence. We were forced to put the defence in that limited form when stating the present

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rules relating to interference with the processes of justice rather than under rules relating to complicity in the actual commission of crime: see paragraph 1.27 above.

[584] See paragraphs 4.69-4.74 above.

[585] See paragraphs 4.58-4.59 above.

[586] This provision addresses the "shopping list" problem: see paragraphs 4.87-4.88 above.

[587] As to which, see Part II of the Bill appended to Law Commission Consultation Paper No 122 (1992).

[588] See paragraphs 2.83-2.88 above.

[589] [1894] 1 QB 710.

law in the Draft Code;[590] and that formulation has led to elaborate and technical interpretative speculation as to whether or not Parliament can be taken to have seen a particular category of persons as "victims" of the particular statutory offence under consideration.[591]

4.102 Not only must such speculation be put to rest, but also, in our provisional view, the defence or exemption should be stated much more widely than at present. Many statutory offences are so defined as to require the participation of two people before they can be committed: obvious examples include offences of sale,[592] which require a buyer before they can be committed; and the offence of carrying on an unregistered care home for old or disabled persons under section 2 of the Registered Homes Act 1984, which would seem to need the assistance of the inmates before it can be committed. Where Parliament has created such an offence, but has not seen fit at the same time to impose principal liability on those who assist in the acts that constitute the offence, we do not think that those people should be even theoretically at risk under the law of complicity.

4.103 We therefore propose a rule, in terms similar to those recommended by the Commission's Working Party in 1972, that a person is not guilty of complicity by assisting an offence if the offence is so defined that his conduct is inevitably incidental to its commission and that conduct is not made criminal by that offence.[593]

4.104 That rule will, we think, apply only in the case of statutory crimes, because there does not appear to be any common law crime defined in such a way as to make the participation of another party inevitably incidental to its commission. The rule will mainly affect what are sometimes regarded as "regulatory", non-indictable, offences, such as offences of sale; but, as the discussion of the present and more limited law has shown,[594] it would also extend to sexual offences of some gravity.

4.105 It is, again, important to point out that this rule applies only to complicity by assistance. Some difficulty was seen both by the Working Party,[595] and by the Commission itself when formulating the Draft Code,[596] in a rule that exculpated from liability a "victim", or incidental party, who had nonetheless initiated or encouraged the commission of the offence. That would indeed be the effect of a rule such as that here under

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[590] Draft Code, clause 27(7). Indeed, it is not wholly certain, on the present authorities, that even the "victim" rationale extends beyond victims of *sexual* offences, as were in issue in *Tyrrell* itself.

[591] See paragraph 2.87 above.

[592] E.g. the prohibition on a licensee selling intoxicating liquor outside permitted hours, under section 59(1)(a) of the Licensing Act 1964, mentioned in n. 548 to paragraph 4.74 above.

[593] Compare PWP No 43 (1972), at pp. 65-69.

[594] See paragraphs 2.83-2.88 above.

[595] PWP No 43, at p. 69.

[596] Code Report, paragraph 9.39.

consideration if applied to the present law of accessoryship, since it would exempt the alleged accessory from the "counselling" as well as from the "aiding" limb of aiding and abetting. The rule that we propose is however restricted to what our predecessors saw as its most clearly justified role, the limitation of liability for mere assistance. We discuss separately below[597] whether any such rule should also apply in cases where the accessory has encouraged or initiated the commission of the offence.

Employees

4.106 A further category of persons who might well be thought to be unjustifiably at risk under a crime of assisting that required only belief that the principal crime was being committed, and who are indeed at risk under the present law,[598] are the employees of individuals or, more usually, companies that break certain kinds of statutory prohibitions. The problem can be demonstrated from the example discussed in paragraph 4.64 above, of the motorist giving a lift to a shop assistant travelling to work at an illegally opened DIY store. The example was originally formulated in the light of concern for the position of the motorist; but if the motorist is potentially liable for assisting the unlawful sale, *a fortiori* the shop assistant must be also.

4.107 We believe (though we invite comment on the point) that in such a case there would be strong objections to the shop assistant being even theoretically at risk of liability for complicity. However, the formulation of an effective and properly limited exemption in such a case poses some problems. The related rule that we propose in paragraph 4.103 does not clearly exclude from liability employees who merely assist the principal in the course of their employment, not least since an offence of, for instance, "sale" is not expressed in such a way as necessarily to require the assistance of an employee of the seller, as opposed to the presence of a buyer. Nor should there be a blanket rule exempting all assistance given in the course of employment: one has only to think of the bodyguards of a violent professional criminal or, less dramatically, the bookkeepers of a fraudulent loan business to see the impossibility of such a rule.

4.108 We have indicated that, in general, we do not think that it is desirable to have different regimes for complicity liability according to whether the principal offence is indictable or only summary in nature.[599] However, we think that that distinction might legitimately be employed to achieve in practical terms the protection that we seek for employees, that they should not find themselves threatened with criminal liability just because the business that employs them has used their services as employees when breaking regulatory or statutory rules. We therefore provisionally propose that an employee should not be liable for complicity by assistance in a *summary* offence committed by his employer in respect of acts that he does within the course of his employment.

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[597] See paragraphs 4.138-4.140 below.

[598] The present law, we venture to remind readers does not, on the better view, require any purpose on the part of the accessory that the principal crime should be committed: see paragraphs 2.63-2.69 above.

[599] See paragraphs 4.171ff below.

4.109 In the case of more serious offences, where the exemption will not apply, we recognise that employees may be put in the situation where they have to disobey their employer in order to avoid liability for complicity. However, that in itself is no cause of objection: indeed, one of the reasons for having a law of complicity at all is to deter all potential assisters, and not merely employees, from giving assistance in criminal enterprises. The limited rule that we provisionally propose in paragraph 4.108 above however seeks to recognise one type of case in which that general objective may be thought legitimately to yield to the problems caused to an employee by law-breaking conduct on the part of his employer.

4.110 The foregoing discussion is couched solely in terms of exempting an employee from complicity in offences committed by his employer. We provisionally consider, however, that, so long as this defence is limited to cases of complicity in summary offences, the exemption should also extend to persons whose acts of assistance towards the commission of summary offences by third parties are done in the course of their employment. For instance, P seeks to acquire premises that he intends to use as a common lodging house, but without registering with the local housing authority, the use thus involving a summary offence under sections 402 and 408(1)(a) of the Housing Act 1985. In seeking and acquiring those premises he employs the services of D1, an estate agent, and D2, a solicitor. Not only D1 and D2, but also the members of their staff who actually handle the transaction, are aware of P's unlawful intentions. It would seem on balance to go too far to inculpate the staff members, who were simply carrying out their employer's instructions, as complicitors.

4.111 That said, we should emphasise two further points. First, where the principal offence is indictable, the balance between crime prevention, and the putting of undue burdens on employees, would seem to come down in favour of the deterrent effect of requiring the employee not to obey instructions that involve him in assisting in serious crime, in the same way as we have suggested that this dilemma should be resolved in the case of serious offences committed by the employer.[600] Thus, for instance, we do not think that it should be an excuse for a shop assistant who administers a sale of equipment that he knows or believes is going to be used in a burglary that he was only doing his job. Secondly, in the example given in 4.110 above, as at present advised we see no objection to the employers, D1 and D2, being liable for complicity, provided they have the required knowledge of P's intentions, even though the offences in question are only summary. We revert to the question of whether there should be a general exemption from the law of complicity when the principal offence is summary only in paragraphs 4.171ff below. We suggest there that those who knowingly assist in what may be quite serious regulatory offences should be controlled by this branch of the law.

4.112 This defence or exception would, again, apply only in the case of complicity by assistance. Different considerations apply in the case of complicity by encouragement, which we discuss in paragraph 4.143ff below.

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[600] See paragraph 4.108 above.

Supply in the ordinary course of business

4.113 A type of case that is frequently cited as needing to be excluded from complicity liability is that of "ordinary business supply".[601] Thus, the taxi-driver who takes a fare to the scene of the crime; the Coal Board that in *NCB v Gamble*[602] supplied the coal that constituted the illegal load; and the wholesalers who sell goods to DIY companies who are going to retail them on Sunday; are all actually or very arguably guilty of complicity under the present law.

4.114 If the law of assisting crime were to be reformed to require purpose on the part of the assister that the principal crime should be committed, these cases are unlikely to cause problems. Such suppliers are unlikely to have as their positive purpose the commission of crime, as opposed to the making of a profit for themselves.[603] If they do have that purpose there seems no reason why they should not be held liable for complicity. However, if the general test is to be merely whether the supplier knows or believes that the goods supplied will be used in the commission of a crime,[604] then some at least of the concern expressed about the present law will remain.

4.115 It should however be noted that the formulation of the mens rea that we have suggested might be appropriate for a reformed law excludes cases of mere *suspicion* that an offence will be committed.[605] That, we would suggest, eases much of the concern that has been expressed about the width of the present law, which may well require nothing more than suspicion or recklessness on the part of the accessory as to the criminal intentions of the principal.[606] A balance has to be struck between the social interest in inhibiting crime by cutting off its materials and the social and personal interest in not unduly inhibiting the conduct of business by the imposition of criminal sanctions. Once belief as to the principal's criminality is required on the part of the supplier, he would seem to place himself in a position where the public interest in crime prevention should prevail, if he continues to supply in those circumstances.[607]

4.116 The potential liability of accessories in general having been limited in that way, it is far from clear that there are any legitimate grounds of policy for conferring further

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[601] This concern has been frequently stressed by Professor Glanville Williams: *The General Part* (2nd edition, 1960), section 124; *Textbook of Criminal Law* (2nd edition, 1983), pp. 341-343; [1990] Crim LR at pp. 99-103.

[602] [1959] 1 QB 11; see paragraph 2.32 above.

[603] See paragraph 4.80 above.

[604] See paragraph 4.83 above.

[605] See paragraphs 4.83-4.84 above.

[606] For this aspect of the present law see paragraphs 2.57-2.58 above and, as to the criticism that that formulation has evoked, paragraph 3.12 above.

[607] See the comment of Professor Howard, cited at n. 564 to paragraph 4.85 above.

exemptions from liability on "business" suppliers; or, indeed, that those who have expressed concern on this issue would argue that there are such policy grounds. For our part, though we invite comment, we see great difficulty in any suggestion that, within the context of a properly limited law of complicity, those who otherwise fulfil the requirements of that law should be excused because they act for mercantile or financial motives. Indeed, from the point of view of discouraging or inhibiting the commission of the principal crime, it might be thought desirable that "business" suppliers, above all others, should be deterred from providing the means of crime.

"Social" assistance

4.117 The concern about "business" suppliers has been extended to what might be called "social" assisters, who do acts that assist the future commission of criminal offences in the course of what are otherwise ordinary and legitimate social activities. Examples include the man who pulls his friend's car out of a ditch to enable it to be driven away, after noting that it is so damaged as to be unroadworthy; or the over-generous host who plies with drink to the point of unlawful intoxication a guest whom he knows is going to drive himself home.[608]

4.118 Such cases push to its limits a law of complicity based on belief as to the future commission of a crime and not on a requirement of purpose. It is far less obvious that there is here what we have suggested to be the proper and desirable need to inhibit business suppliers. A rule that abolished the whole of the law of complicity in the case of summary offences[609] would avoid some of the oddest-seeming examples of "social" complicity, including those quoted in the preceding paragraph;[610] but, the law having decided that summary offences are indeed crimes, it is far from clear that the offence of assisting should never apply to them.[611] Nor can we envisage any rational categorisation by which cases of the type here under discussion could be exempted from a law of complicity that otherwise extended to them.

4.119 As against these concerns, however, there are certainly good reasons for arguing that respect for the law, and the desirability of discouraging law-breaking, makes it legitimate to criminalise any conduct that knowingly assists the commission of a crime; bearing in mind in particular that, under the formulation that we envisage, belief in the future commission of a crime, and not merely suspicion as to the future, will be required to convict an accessory. It may well be thought that such considerations may legitimately prevail even though they make criminal some conduct that is, on one view, a normal part of social life; and even

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608 See Williams, *Textbook of Criminal Law* (2nd edition, 1983), at p.341; and [1990] Crim LR at p.101.

609 As is suggested as an amelioration of the present law by Williams, *Textbook*, at p.343, n. 8.

610 Since the offence of driving whilst unfit through drink or drugs under section 4(1) of the Road Traffic Act 1988 is, despite the recognised danger and irresponsibility of that behaviour, now a summary offence only, albeit one carrying the possibility of imprisonment for up to six months: Road Traffic Offenders Act 1988, schedule 2.

611 See on that issue paragraphs 4.171ff below.

though, for those and other reasons, such conduct is not likely on many occasions to be detected, or to be prosecuted.

4.120 We therefore particularly invite views on whether it is acceptable that the law of complicity by assistance should extend as far as the cases envisaged as possible in this section; and whether those who find such cases inappropriately ones of complicity can propose, as to date we have not been able to do, any categorisation that would effectively exclude the types of cases, but only those cases, that they find anomalous.[612] Commentators will no doubt wish to bear this problem in mind when considering two more general issues, namely whether complicity by assistance should be limited to cases where it is the accessory's purpose that the principal crime should be committed;[613] and whether liability for complicity as a whole should be limited to complicity in indictable, or in some other category of "serious", offences.[614]

Defences associated with "good motive"

4.121 We referred in paragraphs 2.59-2.62 above to the possibility that, contrary to the general principles of the criminal law, it is at the moment a defence in respect of conduct that would otherwise involve accessory liability to show that D's acts were done with a good motive. Although we invite comment on this point, we do not think that such a defence is either necessary or desirable. There is in effect no authority for it; its limits are obscure and would give rise to much argument and uncertainty; and if the mental element of assisting crime is properly defined, so that there is in every case required at least a belief on the part of D that what he does will assist P to commit a crime, then a defence of this degree of generality does not seem necessary to avoid hard cases.

4.122 That is not to say, however, that there may not be particular cases, such as those that we considered when drawing up the Draft Code, in which a more specific defence, based on particular types of good motive, should be provided. We mention such possible defences, on all of which we again invite comment, in paragraphs 4.123-4.137 below.

Law enforcement

4.123 No such defence is formally recognised in the present law.[615] However, in the Draft Code we suggested the possibility of a defence in terms that a person should not be guilty as an accessory by reason of anything that he does with the purpose of preventing the

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[612] "A rule based on the nature of the thing [supplied] as 'an ordinary marketable commodity' is not workable. Motor cars and weedkiller are ordinary marketable commodities. A more feasible distinction is one based on the seriousness of the offence contemplated": *Smith & Hogan*, p. 136. These authors however go on to point out that the disadvantage of such a rule is its uncertainty.

[613] See paragraphs 4.76ff above.

[614] See paragraphs 4.171ff below.

[615] See paragraphs 2.89-2.91 above.

commission of the principal offence.[616] The case that we had in mind was that of the police informer or undercover agent who does acts that in fact assist the commission of an offence but whose purpose is to frustrate its commission.[617]

4.124 At present, persons in such a case will escape liability if, perhaps entirely irrespective of their own law enforcement efforts, the principal offence is not in fact committed. Under a law that attaches liability at the moment the act of assistance is performed, such a defence is perhaps even more necessary. We suggest, for comment, that it might appropriately have the following more detailed content.

4.125 If the defence is to be effective, it will have to be expressed in fairly wide terms, to exempt any act of assistance that is performed during or as part of attempts to prevent the commission of the principal offence.[618] Thus, for instance, it may be necessary, in order for D to maintain his "cover", for him to drive members of the gang that he has joined to the scene of the crime, before informing the police of their whereabouts with a view to their arrest. That act of assistance in itself is, fairly clearly, not directed at the prevention of the commission of the crime, but we suggest that it should benefit from this defence if it is part of an overall course of conduct on the part of D that is so directed.

4.126 Provided that D's overall purpose is the prevention of crime, it should not be necessary to be too demanding, after the event, as to the appropriateness of the measures that he takes to fulfil that purpose. Weight should therefore be given to D's judgement: it should be enough that he believes that his act of assistance is necessary as part of the implementation of his purpose of preventing the commission of the principal crime.

4.127 The foregoing discussion limits the defence to acts of assistance in the particular crime that it is D's purpose to prevent. We however invite views on whether the defence should go even further, to exculpate assistance in *any* crime in the course of seeking to prevent the commission of an offence. The type of case that we have in mind is as follows. D joins in the preparations for a bank robbery, with a view to frustrating its actual commission. In order to make his involvement in those preparations for the robbery seem genuine to the principal offenders, D agrees to assist in a burglary to acquire equipment for use in the robbery. We appreciate that that case poses considerably more problems than cases of the type discussed in paragraph 4.125 above. There is nothing in the law to suggest that if D actually committed the burglary as a principal, with the same motive, he would or should be excused. That perhaps indicates that the present rule should be regarded as a particular limitation on accessoryship, as a recognition that the social fault of assisting a criminal is mitigated or removed by efforts to prevent that assistance being effective in the commission of the principal crime;[619] rather than as an expression of a more general social principle or excuse. We also recognise that there must be stringent limits on the extent to which, in

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[616] Draft Code clause 27(6)(a).

[617] Code Report, paragraph 9.33.

[618] This is, perhaps, not made entirely clear by the formulation in clause 27(6)(a) of the Draft Code.

[619] Similar considerations inform the defence of withdrawal: see paragraph 4.132 below.

particular, police officers should be permitted to commit criminal acts, of any sort, with impunity.

4.128 Although the principal beneficiaries of a "law enforcement" defence may be police officers, or those working under police supervision, notably as informers, we do not think that the defence should be formally limited to such cases. However, it may be noted that citizens who give assistance in criminal schemes as part of a law enforcement operation entered into entirely on their own initiative may find some difficulty in establishing that law enforcement was indeed their purpose in so acting.

Acts with the purpose of limiting harmful consequences

4.129 This defence, which has many affinities with the defence of law enforcement, is almost as obscure as that defence as to its status in the present law.[620] In the Draft Code we formulated it as applying to anything done by the accused

> with the purpose of avoiding or limiting any harmful consequences of the offence and without the purpose of furthering its commission.[621]

We pointed out that such a defence seems to have been in the minds of those of their Lordships who rejected the possibility of criminal liability on the part of the doctor in *Gillick*, without having been expressly formulated as such; and we continued:

> The generalisation that acts [done for the sole purpose of containing the harm done by the principal] do not attract criminal liability seems plainly right although, perhaps unsurprisingly, authority for it is lacking. We should perhaps refer to some topical examples. The supply of condoms to prisoners, or of sterile hypodermic needles to drug abusers, if done solely for the purpose of limiting the risk that the prisoners or addicts will be infected by the AIDS virus as a result of anticipated acts of buggery or injection, would, on that ground alone if on no other, not attract accessory liability for any offences that those acts might involve.[622]

4.130 We continue to be of that opinion. We recognise that in such cases there would be unlikely to be pressure for prosecution;[623] and that in the cases mentioned there might be considerable doubt as to whether D's acts had in fact assisted the unlawful intercourse or drug abuse. Nevertheless, we consider that in cases that fall within the formulation offered by the Draft Code there should be a simple and clear ground of defence for those who act in a responsible fashion to prevent the ill-effects of crimes committed by others, without the need to argue the more difficult aspects of the general law of accessoryship.

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[620] See paragraphs 2.92-2.94 above.

[621] Draft Code, clause 27(6)(b).

[622] Code Report, paragraph 9.35.

[623] Though some of the passions aroused by *Gillick* make it impossible to take that view with complete confidence.

4.131 Both in the case of the limitation of harmful consequences and, in particular, in the case of law enforcement, much of the information on which the defence rests will be in the exclusive knowledge of the accused: to take the most obvious example, the need perceived by him to act in a certain manner as part of his overall endeavour to prevent crime. We therefore invite views as to whether in either case an accused relying on the defence should bear an evidential burden.

Withdrawal

4.132 There is no doubt that a defence of withdrawal exists in the present law of aiding and abetting, involving the taking of counter-measures between the act of assistance and the commission of the principal crime. The terms and limitations of this defence are, however, unclear,[624] and withdrawal has never been thought to be an available defence in cases of incitement.[625]

4.133 It has been suggested[626] that a defence of withdrawal is particularly required in respect of an offence of *inchoate* aiding, since before the principal crime is committed the aider may be in a position to reverse the real damage in which he has involved himself, the commission of that crime; and if he is in a position to reverse that damage he should be encouraged to try to do so. In truth, however, exactly the same point arises under the present law. Even in the present law of aiding and abetting the accessory's fault is complete as soon as his act of assistance is complete, his criminal liability thereafter depending on what may be the complete accident of whether or not the principal crime is in fact committed.[627] In both cases, the arguments for allowing a defence of withdrawal are essentially pragmatic, the social value of encouraging the reversal of the accessory's acts of assistance overriding the logic that applies to accessoryship the general rule of law that repentance once the crime has been committed is no defence, however much it may be a matter of mitigation.

4.134 If, as we propose, assistance and encouragement are treated separately, it is possible to consider the terms of this defence much more clearly and rationally than under the current law, where aiding and counselling are regarded as sub-classes of a single category of aiding and abetting. That has led to expression of the current law in terms of a single concept of "countermand". This is a concept which is difficult to apply, and it produces, perhaps,

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[624] See paragraphs 2.95-2.101 above.

[625] See paragraph 2.100, n. 303 above.

[626] *Spencer*, p. 160.

[627] See paragraph 4.24 above.

results which are unduly favourable to the accused,[628] in a case where D has provided assistance, and not merely encouragement, towards P's criminal enterprise.[629]

4.135 In the case of assistance, we consider that such a defence should only be available if the assister takes all reasonable steps to prevent the commission of the crime towards which he has assisted.[630] That requirement in our view gives proper effect to the balance between the need to recognise that the accused, by giving assistance towards a criminal act, has already engaged in seriously antisocial behaviour; and the pragmatic consideration that assisters who repent while there is still time should be given positive encouragement to prevent the commission of a further antisocial act, on the part of their principal.

4.136 What are "all *reasonable* steps" will depend on the circumstances of the case. In *Rook*[631] the Court of Appeal said, obiter,[632] that the suggestion that "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse"[633] might go too far. "It may be that it is enough that he should have done his best to step on the fuse." The Court described this as a question of policy as much as of [the current] law. As to what the law should be, however, we agree that what should be required are reasonable *efforts* on the part of the defendant rather than necessarily success in preventing the crime. It would not normally, we think, be reasonable to expect a defendant to expose himself to serious additional risk, or to create the likelihood of further offences occurring: for instance, by physically intervening to try to stop an armed robbery on a bank, when he had previously provided information to the robbers about how the security arrangements at the bank could be circumvented. The most obvious step in such circumstances is that the defendant should inform the police of the planned offence, with sufficient detail to enable them to intervene. However, while we invite views on this point, we are not as at present advised minded to propose that notification of the police should be a necessary condition of the defence of withdrawal.

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[628] For instance, in *Whitefield* (1984) 79 Cr App R 36 D not only encouraged P to burgle D's next-door neighbour, but also provided information to P as to how and when the burglary could best be committed. It was however held that D had done enough to ground a defence of withdrawal by communicating to P that he would take no *further* part in the operation: any need to reverse the effects of his *previous* acts of assistance does not seem to have been considered.

[629] See paragraphs 2.97-2.100 above.

[630] This formulation has some resemblance to that proposed by the Commission's Working Party in 1972: see PWP No 43, proposition 9(b). The rule proposed in 1972 would, however, have been satisfied if the accused took *any* step sufficient to evidence his withdrawal from participation in the enterprise. That approach mirrors the difficulty of the current law, referred to in paragraph 4.134 above, in not giving sufficient weight to the need to counter the effect of already furnished assistance, and the Working Party's proposals were accordingly not well received on consultation. We now propose a somewhat different and more demanding rule, that the accused must take all reasonable steps available to him to prevent the commission of the crime.

[631] [1993] 1 WLR 1005.

[632] [1993] 1 WLR at p. 1012H.

[633] Cited by Williams, *Criminal Law: The General Part* (2nd edition, 1960), paragraph 127, from *Eldredge v. US* (1932) 62 F 2d 449, *per* McDermott J.

4.137 In the case of *encouragement* to commit a crime, somewhat different considerations apply. Since the nub of the defendant's fault is encouragement and not assistance, it may be enough that the encouragement is countered by (sufficiently forceful) *dis*couragement. We pursue that matter when dealing generally with our proposals as to encouragement in paragraphs 4.168-4.169 below.

Cases where it is the defendant's purpose that the principal offence should be committed

4.138 We have stressed that a number of the potential defences discussed above are most obviously necessary in cases where the defendant is merely aware that his conduct will assist in the commission of a crime, without it being his purpose[634] in acting that that crime should be committed. Where the commission of the principal crime can be shown to have been the defendant's purpose, it is difficult or impossible to apply reasoning that supports a possible defence of employment;[635] "ordinary course of business";[636] or "social" assistance;[637] and our provisional conclusion is that those defences should not be available in such a case. That is also the case in respect of the defences of law enforcement[638] and limitation of harmful consequences.[639] Indeed, where the defendant's purpose is that the principal crime should be committed it is difficult to see that his conduct can also be described as falling within the basic requirements of either of those defences.

4.139 We also incline to the view that the defence of incidental involvement in statutory offences[640] should not be available, or at least should only be available in a very limited range of cases, if the "victim" had as his purpose the commission of the principal offence. The defence that we propose is wide in its ambit, including not only sexual offences that were in issue in *Tyrrell* but a range of cases in which the "assister" is merely the purchaser of illegally sold goods or the otherwise innocent participant in other types of unlicensed or illegal operations.[641] If he seeks to bring about the commission of these offences the need to protect him from liability falls away. However, there may be a difference in respect of offences such as that in issue in *Tyrrell* itself, unlawful carnal knowledge of a girl under the age of sixteen, where it can be said that the statute was passed to protect women and girls against themselves,[642] such protection perhaps extending to cases where they positively seek

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634 On the relation of "purpose" and "intention", see n. 574 above.

635 Paragraphs 4.106-4.111 above.

636 Paragraphs 4.113-4.116 above.

637 Paragraphs 4.117-4.120 above.

638 Paragraphs 4.123-4.128 above.

639 Paragraphs 4.129-4.131 above.

640 See paragraphs 4.101-4.105 above.

641 See paragraphs 4.101-4.102 above.

642 Lord Coleridge CJ, [1894] 1 QB 710 at p. 712.

the commission of the offence against them. We therefore invite comment on whether this defence should be available in respect of some offences even to assisters who have the commission of those offences as their purpose; and, if so, what specific offences or types of offences should be covered.

4.140 The considerations discussed in the preceding two paragraphs do not apply to the defence of withdrawal,[643] since that defence turns on steps taken by the defendant to rectify the effects of his complicity, rather than on circumstances that excuse his complicity in the first place. It may be noted, however, that a person who originally had as his purpose the commission of the principal offence may need to be more active than others before he can be deemed to have taken all reasonable steps to prevent its commission.

Other possible defences

4.141 In the Draft Code the Commission, in an attempt to reflect one of the more obscure parts of the current law, formulated a defence in terms of doing an act of assistance in the belief that the defendant is under an obligation so to act.[644] This "defence" is extremely difficult to express in other than very vague terms and, as stated, is in our view insupportable.[645] Whatever protection such a defence would legitimately provide is better and more precisely to be found in the various more limited defences already discussed. We do not see this defence as forming an element in a reformed law.

4.142 We believe that we have reviewed in paragraphs 4.100-4.137 above all the cases that might reasonably be considered potentially to provide a defence to "assistance" liability. However, we invite comment on whether there are any other cases that ought to be considered, and what respondents' grounds are for taking that view.

ENCOURAGING CRIME

Introduction

4.143 In this section we set out our provisional proposals for the second aspect of the new law, dealing with the encouragement, rather than the assistance, of crime. We envisage this part of the new law covering the ground that at the moment is addressed not only by the "counselling" element in aiding and abetting but also by the present law of incitement. The separation of encouragement from assistance enables a clearer and more precise approach to some of the policy issues that affect the law on encouraging crime, freed from the present need to formulate rules that cover both the aiding and the counselling aspects of aiding and

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[643] See paragraphs 4.132-4.137 above.

[644] Draft Code, clause 27(6)(c); Code Report, paragraph 9.36.

[645] See paragraphs 2.30-2.33 above.

abetting.[646] At the same time, however, it will be convenient at many stages of the discussion to compare the proposed law on encouragement with that already suggested for assisting and helping, both to demonstrate common features and to demonstrate how the two types of complicity differ.

An inchoate offence

4.144 We have indicated our provisional conclusion that the offence of assisting crime should in future be put on an inchoate basis, in that the actual commission of the crime assisted should not be a pre-condition to liability.[647] Incitement, however, has always been regarded as an inchoate offence, committed by, and complete in, the act of incitement itself.[648] We see no reason why that rule should be changed for the offence of encouraging crime that we envisage as taking the place of incitement; and there is no reason in the current law, apart from historical accident,[649] why the counselling component of aiding and abetting should be handled differently from incitement in this respect.

4.145 We will therefore proceed on the basis that the offence of encouraging crime will be complete once the act of encouragement is completed with the necessary mens rea; and will not depend on the actual commission by the principal (as it is convenient to continue to call him) of the crime encouraged. That arrangement however demands that care is taken in defining both what is sufficient to constitute an act of "encouragement" and what the objective of the encourager must be: elements that have not always been analysed with sufficient clarity in discussions of the present law of incitement.[650]

The conduct constituting the offence

4.146 Under the present law, if "abet" and "counsel" are, following the ruling in *A-G's Reference (No 1 of 1975),* to be given their ordinary meaning,[651] then mere encouragement of the commission of a crime, as well as the narrower concept of the instigation of that

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[646] See paragraphs 4.9-4.16 above. We may briefly summarise, from the discussion of the offence of assisting crime, three examples of the different considerations affecting aiding on the one hand and counselling on the other. First, the need to save from criminal liability an employee, or a person who acts in the ordinary course of business, discussed in paragraphs 4.106-4.116 above, is much less obviously pressing in the case of one who encourages another to commit a crime than in the case of one who merely assists in its commission. Second, as pointed out in paragraph 4.105 above, it is difficult to formulate a reasonable single rule protecting the "victim" of a statutory offence if the rule has to apply to counselling as well as to aiding. Third, as described in paragraph 4.134 above, there may be very different considerations in establishing an effective "withdrawal" from complicity according to whether the previous act of complicity took the form of assistance to the principal criminal or merely encouragement of him.

[647] See paragraphs 4.20-4.40 and 4.99 above.

[648] See paragraph 2.126 above.

[649] As to which, see paragraph 2.10, n. 71 above.

[650] See paragraphs 2.127-2.133 above.

[651] [1975] QB 773 at p. 775.

activity, would seem to be covered by the offence of aiding and abetting.[652] To satisfy the present crime of incitement "an element of persuasion or pressure" on the part of the inciter may be necessary, but the law on the point is far from clear.[653] What is needed in the reformed law is a formula that adequately encapsulates, and limits, the activity that is sought to be prohibited.

4.147 The policy questions are (i) whether the defendant must be shown to have initiated or caused the principal's intention to commit the principal crime; and (ii) even in cases where the defendant did not initiate the principal's criminal intentions, whether he must be shown to have influenced or attempted to influence those intentions by persuasion or exhortation. These issues arise most clearly where the principal has already determined to commit the principal offence, and the defendant merely gives agreeing support to that determination; but the decision as to whether, in those circumstances, the defendant should himself be criminally liable decides the limits of the whole law of encouraging crime.

4.148 Our provisional conclusion, on which we invite comment, is that the law should extend to all those who give encouragement and moral support to the commission of a crime, whether or not that encouragement has the effect of changing the principal's mind, or is intended to change the principal's mind, in the direction of the commission of that crime. There are reasons both of practicality and of principle for that view.

4.149 First, it would be extremely difficult to distinguish, with the certainty necessary for a criminal conviction, between a case where D influenced or persuaded P to commit a principal crime; and a case where D merely encouraged or supported P in the commission of that crime. There would be infinite room for allegation and argument that P would have committed the crime in any event; or had already made up his mind to do so before receiving D's encouragement; or that D's encouragement was only one of many factors influencing P's decision. Such allegations would be very easy to make and very difficult to counter: to the extent that the law of encouraging crime might well become a dead letter.

4.150 Second, however, quite apart from the practicalities of the matter, to encourage others to go ahead and commit crimes that they have already decided on, and to support them in that determination, is objectionable in itself in any law-abiding system. Even one who has decided to commit a crime may repent before he actually acts; encouragement from others may inhibit such repentance. And more generally, to give encouragement to those who are committing or thinking of committing crimes conflicts with the citizen's duty of upholding the law, and creates an antisocial atmosphere in which criminal activity is made to appear regular and praiseworthy.

4.151 We therefore proceed on the basis that encouragement to commit a crime should be enough to constitute this offence, and that it should not be necessary to show that the defendant initiated or caused either the commission of that crime or the principal's plans to commit it. Such would already appear to be the law in respect of the abetting and counselling

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[652] See paragraph 2.12 above.

[653] See paragraph 2.132 above.

aspects of aiding and abetting, so far as it is possible to identify any rules specifically addressing those activities. It would also appear to be the case that, despite the language in which the offence of incitement is sometimes described, there is no requirement that the inciter should in fact be the motive force in the commission of the principal crime.[654]

4.152 The uncertainty of the limits of the present law is caused by the absence of any authoritative definition either of the counselling element in aiding and abetting or of the crime of incitement. It is therefore necessary to consider carefully how the new offence should be described and defined, in order to capture the policy approach suggested above. For reasons that will become apparent, that question is best addressed at the same time as the question of the mental element of the offence, to which we now turn.

The mental element of the offence

4.153 The general policy issue, much debated in connection with *assisting*, as to whether the defendant must have the commission of the principal crime as his purpose, should be much easier to resolve in the case of encouraging crime. That is because the whole notion of encouraging, inciting or exhorting the commission of a crime presupposes that the encourager wishes that crime to be committed. As Ashworth puts it, in connection with the present offence of incitement:

> "The fault element in incitement is that D should intend the substantive offence to be committed and should know the facts and circumstances specified by that offence. This is unlikely to cause a problem in most cases, since someone who either encourages or exerts pressure on another person to commit an offence will usually,[655] by definition, intend that offence to be committed."[656]

Subject, therefore, to some subtleties of definition, considered below, there should be no danger of conduct that merely happens to fortify P in his criminal inclinations, without that being D's intention or purpose, falling within the ambit of a crime of "encouragement".

4.154 In our view (though we invite comment) that is the correct policy position for the law to take. We are concerned here only with exhortation or encouragement, and not with conduct that actually assists in the commission of an offence. If D's conduct can truly be said to assist the commission of crime, and he is aware that that is so, then there are strong arguments for imposing legal inhibitions upon it, even though the giving of such assistance was not D's purpose. Where, however, D's conduct is not of assistance to P, but merely emboldens or fortifies P in committing a crime, it seems to extend the law too far to make D's conduct itself criminal, unless D intended it to have that effect. Examples can easily be cited. Thus, D might publish an article criticising the use of animals in scientific experiments, that inspires P to cause criminal damage at a particular laboratory; or a politician criticises the policy of the police in their use of the "breathalyser" powers, which

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[654] See paragraphs 2.132-2.133 above, especially at n. 386 to paragraph 2.133.

[655] This note of caution may be introduced in deference to the problem discussed in paragraph 4.156 below.

[656] *Ashworth*, p.417.

causes one of his listeners to determine to resist such approaches, if needs be by force, on the next occasion that they are made to him. If D's remarks can in truth be analysed as encouraging or persuading others to commit such crimes, then he should be convicted. It is quite a different matter if the commission of crime is the unlooked-for outcome of his comments on a matter of public interest.

4.155 Within those policy assumptions, there are a few comparatively detailed issues of practical definition. First, the conduct encouraged must be a definable crime, and (we suggest) it should be necessary, as in the present law of incitement,[657] that the encourager is aware of the elements, both physical and mental, that make the principal's conduct criminal. To be liable, therefore, he should have to be shown to have encouraged a defined category of criminal conduct on the part of the principal, without necessarily descending to specificities as to the place, time or detailed circumstances in which that conduct is to take place. He should also know or believe that the principal, when he acts, will do so in a mental state that will render his action criminal. These issues seem to us to be the same as arise in relation to assisting crime, and we refer the reader to the discussion of them in paragraphs 4.57-4.62 above.[658]

4.156 Second, the requirement or assumption of purpose or intention on the part of the encourager has been seen as causing some difficulty in the (no doubt rare) case where the encourager or inciter acts under duress.[659] D is caused, by the threats of terrorists, to persuade his son P to plant a bomb on an airliner. The last thing that D wants to happen is the death of the passengers and crew, though that is the inevitable outcome of the bombing. However, this problem is easily avoided, as Williams suggests,[660] by recognising that what D must intend, and what he clearly does intend through his decision, however reluctant, to exercise encouragement towards P, is the commission of the crime by P, in the terms suggested in paragraph 4.155 above.

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[657] See Draft Code, clause 47(1)(b); and the citation at n. 656 above. The Code formulation does not follow the decision in *Curr* [1968] 2 QB 944, which appeared to require actual *knowledge* of the principal's mens rea, and thus that the principal indeed possessed such mens rea. See Code Report, paragraph 13.11, and paragraph 2.128 above.

[658] The Commission's Working Party, dealing with amendments to the law of incitement, suggested that recklessness as to the principal's mens rea should suffice for guilt: WP No 50, paragraph 93, n. 151; and see also Law Com No 143, paragraph 14.6, n. 11. That proposal was, however, put forward with a view to making incitement consistent with the rule in the crime of *attempt* providing different mental states in respect of the consequences and in respect of the circumstances comprising the principal offence: WP No 50 at paragraph 89(b). That latter approach was not accepted by the Commission itself (see Law Com No 102, pp. 8-9) or by Parliament (Criminal Attempts Act 1981, section 1). The suggestion of the Working Party can therefore in our view easily yield to the general principle that limits liability for complicity by requiring on the part of the complicitor knowledge or belief as to all the elements of the principal crime.

[659] Discussed by Sullivan [1988] Crim LR 642, and in greater detail by Williams, [1990] Crim LR 12-14. Both writers were handicapped by the problem of correctly expressing the terms of an offence of counselling through a general formula, such as that adopted in clause 27 of the Draft Code, that has to cover the aiding as well as the counselling element in accessoryship.

[660] [1990] Crim LR at p.13.

Omissions as encouragement

4.157 We discussed in paragraphs 4.69-4.74 the problems caused for the present law of complicity by omissions to exercise a right of control over the activities of law-breakers; and by "mere presence" at the scene of a crime. It will be recalled that our provisional conclusion, as to the general offence of assistance, is that the accused should merely need to be aware, and not necessarily to intend, that his acts are of assistance in the commission of crime. Because of the broader potential reach of that offence, therefore, we suggested that it could become oppressively wide if extended to omissions, as opposed to positive action.

4.158 The case of encouragement is, however, different in a number of respects. Many of the leading cases in the present law concern encouragement rather than assistance: for instance, the spectators who cheer an illegal prize-fight;[661] or criminals present in a vehicle driven by P, whose conduct is intended by them to fortify P in driving dangerously to help them avoid arrest.[662] In these cases the question, one of fact, is whether D's conduct can truly be described as "encouragement", and is intended by D to be such. If D in truth encourages P to commit crimes it does not seem unreasonable, or to make the law dangerously wide, if it encompasses conduct that could also be described as an omission, or a failure to perform a duty. We say conduct that could *also* be described as an omission because it will be very rare for *mere* inactivity on the part of D to constitute an act of encouragement: the spectators must not merely be casual bystanders, but must be there to cheer; the passengers must not be merely accidentally in the vehicle, but must be there as part of a common understanding with and support of the activities of the driver.[663] But where such people do intend to encourage the criminal activities of others, then this offence should extend to them.

Our provisional definition of the offence of encouraging crime

4.159 At the stage of a Consultation Paper we are not drafting a Bill, but we hope that, as in the case of assisting crime,[664] it may assist critical assessment of these suggestions to offer a fairly precise formulation of the new offence.

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[661] "The chief incentive to the wretched combatants to fight on until (as happens too often) dreadful injuries have been inflicted and life endangered or sacrificed is the presence of spectators watching with keen interest every incident of the fight": *Coney* (1882) 8 QBD 534 at p. 544, per Mathew J.

[662] "The respondents being throughout of the same mind and remaining in the van thereby gave encouragement to P to adopt any available means to avoid their arrest, including driving the van no matter how in order to do so. No express words were necessary to constitute encouragement of P.": *Smith v Reynolds* [1986] Crim LR 559 at p.560.

[663] Compare the position with regard to assistance, discussed in paragraphs 4.71-4.74 above, where a person may often in fact "assist" the commission of a crime, and be aware that he is doing so, by a mere omission to perform a duty or exercise control over another. As indicated in paragraph 4.156 above, we envisage that the defendant in a case of encouragement must intend the commission of the crime by the principal. It is very unlikely that a mere omission would be sufficient to amount to such intentional encouragement.

[664] See paragraph 4.99 above.

4.160 In the Draft Code, when considering the present crime of incitement separately from aiding and abetting, we retained the word "incite".[665] We doubt, however, whether that word is appropriate for the new offence. "Incite", in its normal meaning, has somewhat instigatory connotations,[666] thus limiting the new offence more narrowly than we, provisionally, consider desirable.[667] We rejected the simple word "encourage" because of a fear expressed by one of the Code scrutiny groups about its ambiguity. "Encourage" or "encouraged", used without further expansion, can refer either to the act of encouragement, or to the fact that a person was actually encouraged. Thus, it is a perfectly natural use of language to say "The company has been encouraged by the poor performance of its competitors"; but the present offence is not intended to extend to such non-purposive, accidental influence or support.[668] And, on the other side of the coin, the simple use of the word "encourage" might be thought to require that the principal had in fact been encouraged or influenced in committing the principal crime: which is neither the present law,[669] nor what we think that the law ought to be.[670]

4.161 Despite these problems, however, we consider that "encouragement" best captures the nature of the activity that the law should seek to control. The, perhaps marginal, objections just discussed can be met by clearly defining the elements of the offence so as to remove ambiguity. First, it can be made plain that *actual* influence need not be exerted on the principal.[671] Second, a requirement that the defendant must intend or have as his purpose[672] the commission of the principal crime will ensure that casual or accidental "encouragement" does not fall within this offence.[673]

4.162 Thus explained, "encouragement" is in our view both a necessary and a sufficient description of the conduct aimed at by the new offence. However, it may be considered desirable to mention some other common activities that also fall within this offence, even though, strictly speaking, they are all cases of encouragement. Thus, commanding or soliciting the commission of crime will be a common form of the new offence and perhaps should be specifically mentioned, even though one who can be called a commander or solicitor must in ordinary usage also necessarily be an encourager of the principal's conduct.

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[665] Draft Code, clause 47; Code Report, paragraph 13.6.

[666] Defined in the *Shorter Oxford Dictionary* as "to put in motion;...[t]o urge or spur on; to stir up, instigate, stimulate".

[667] See paragraphs 4.147-4.151 above, where we also point out that, despite its nomenclature, the present offence of incitement may well not be limited to acts that have an initiatory effect.

[668] See paragraph 4.154 above.

[669] See Code Report, paragraph 13.6.

[670] See paragraph 4.151 above.

[671] See paragraph 4.163(2) below.

[672] For the interchangeability of these expressions, see n. 574 above.

[673] See paragraphs 4.154 above and paragraph 4.163(1)(b) below.

4.163 We therefore suggest, for critical comment,

"(1) A person commits the offence of encouraging crime if he

(a) solicits, commands or encourages another ("the principal") to do or cause to be done an act or acts which, if done, will involve the commission of an offence by the principal; and

(b) intends that that act or those acts should be done by the principal;[674] and

(c) knows or believes that the principal, in so acting, will do so with the fault required for the offence in question.[675]

(2) The solicitation, command or encouragement must be brought to the attention of the principal, but it is irrelevant to the person's guilt whether or not the principal reacts to or is influenced by the solicitation, command or encouragement.[676]

(3) The defendant need not know the identity of the principal, nor have any particular principal or group of principals in mind, provided that he intends his communication to be acted on by any person to whose attention it comes.[677]

(4) "Offence" in sub-paragraphs (a) and (c) of sub-section (1) above means the breach of a specified prohibition laid down by statute or the common law; but for the purposes of this section the defendant may solicit, command or encourage the commission of such an offence without intending that it should be committed at a specific time or place.[678]

4.164 This formulation may appear a little elaborate, but in our view it is safer to spell out the intended effect of the law in particular situations of difficulty, rather than rely for the

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[674] This provision, on one view redundant because of the primary meaning of the word "encouragement", covers the point discussed in paragraph 4.156 and the second part of paragraph 4.161 above.

[675] This requirement is the same as in the present law of incitement; it is discussed, in the context of the new offence, in paragraph 4.155 above.

[676] This provision meets the objection to the term "encouragement" that we encountered in connection with the Draft Code, as discussed in paragraphs 4.160-4.161 above. It also confirms the requirement in the present law that an incitement, to be such in law, must be communicated to its intended object: *Banks* (1873) 12 Cox CC 393, cited in n. 385 to paragraph 2.133 above.

[677] This provision is intended, perhaps for the avoidance of doubt, to cover the case where the defendant issues a general incitement or encouragement to commit an offence, for instance through a newspaper article. Cf *Most* (1881) 7 QBD 244, cited in n. 387 to paragraph 2.134 above. The case where encouragement is directed at a specific and limited group of people is covered under sub-section 1(a), by the assumption that references to "principal" in the singular include the plural.

[678] This provision deals with the question of the specificity of the principal offence, which has been already discussed in connection with assisting crime: see paragraphs 4.58-4.59 and paragraph 4.99(4) above.

solution of those problems on general and necessarily vague assumptions about the implications of "incitement" or "encouragement". We put it forward as the basis for comment on the limits of the offence of encouraging crime.

Defences to an offence of encouraging crime

Introduction

4.165 As in the case of assisting crime,[679] we now consider whether the offence of encouraging crime requires the creation of defences special to that offence, over and above the general common law and statutory defences that apply throughout the criminal law.

4.166 Many of the defences discussed in connection with assisting crime are, in our view, not appropriate for consideration in connection with encouraging crime. That is because such defences are primarily or wholly designed to meet cases in which the defendant is aware that he is assisting the commission of a current or future crime, but does not have the commission of that crime as his purpose. We therefore take the view, as we did in respect of those cases of assisting crime in which it is the accessory's intention or purpose that the principal crime should be committed, that the defences of employment; "ordinary course of business"; "social" assistance; law enforcement; and limitation of harmful consequences; are inappropriate in respect of a case of encouragement.[680] In the first two cases, the policy reasons for affording relief to one who knowingly but non-purposively assists do not apply to one who encourages; in the other cases, the factual circumstances that have to be established for the defence even to be considered do not seem to exist where the accessory has *encouraged* the commission of the crime.

Persons involved in statutory offences

4.167 As in the case of assisting crime,[681] this defence raises more difficult issues. In most cases, it will be simply inappropriate to extend the defence to an encourager. For instance, the situation of the after-hours purchaser of drink[682] does not seem to be deserving of sympathy if he can be shown to have encouraged, rather than merely to have been the passive beneficiary of, the landlord's illegal sale.[683] We therefore see no good reason for the present defence to be applied generally in cases of encouraging crime. However, as in the case of assisting crime we recognise that there may be cases, conspicuously those of sexual offences against minors, where the "victim" should be exculpated even though she

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[679] See paragraphs 4.100-4.137 above.

[680] See paragraphs 4.106-4.131 and, in particular, paragraph 4.138 above.

[681] See paragraphs 4.101-4.105 and 4.139 above.

[682] Under section 59(1)(a) of the Licensing Act 1964: see n. 592 to paragraph 4.102 above.

[683] We recognise that it may not need much activity on the part of the customer to transfer him from the status of an assister to that of an encourager. However, we do regard it as a matter of importance that, in order to fall under the offence of encouragement, the customer must be proved to have encouraged the commission of the offence and to have had as his purpose that the offence be committed: see paragraph 4.163(1) above.

encouraged rather than merely assisted in the commission of the offence.[684] We therefore invited comment, as we did in connection with assisting crime, as to what offences might be covered by such a rule.

Withdrawal

4.168 Since incitement is a separate offence, the defence of withdrawal, potentially recognised in respect of counselling as in respect of all the other elements of aiding and abetting, is not available in cases of incitement.[685] There is however no obvious policy reason why that should be so; and with the replacement of both incitement and counselling by a new offence of encouraging crime the matter can be considered afresh.

4.169 The pragmatic considerations in favour of recognising effective repentance and counter-measures before the principal crime is committed[686] apply equally in the case of encouragement as in the case of assistance. In stating the law in respect of the counselling element of aiding and abetting for the purposes of the Draft Code we tentatively suggested that the defence of withdrawal was available if the accessory *either* countermanded his encouragement with a view to preventing the commission of the principal offence; *or* took all reasonable steps with a view to preventing its commission.[687] We provisionally consider that those are the correct formulations for a defence of withdrawal applied to a new offence of encouragement. We do, however, invite comment on whether it should be sufficient that the encourager subsequently does one or other of the acts of countermanding his encouragement or taking steps to prevent the commission of the principal offence. It seems arguable that where it is possible for him to do so, the encourager should not only countermand his encouragement but also take steps to prevent the offence, most conspicuously by enabling the police to intervene.[688]

ISSUES COMMON TO ASSISTING AND TO ENCOURAGING CRIME

Introduction

4.170 Although it has entailed a certain amount of cross-referring between the two aspects of complicity, we believe that many issues are seen more clearly if they are discussed separately in respect of assisting and in respect of encouraging crime. There are, however, a number of issues that seem common to both types of complicity, and which we therefore discuss in this section. Those issues are:

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[684] See paragraph 4.139 above.

[685] See paragraph 2.100, n. 303 above.

[686] See paragraph 2.96 above.

[687] Draft Code, clause 27(8).

[688] As to the extent to which steps to prevent the commission of an offence must, to be reasonable, include co-operation with the police, see paragraph 4.136 above.

Whether there should be liability for complicity in the commission of summary offences; or any other limitation on the type of substantive crime to which the offences of assisting and encouraging crime may be applied (paragraphs 4.171-4.173 below)

Whether there should be liability for complicity if the principal offence is impossible to commit (paragraphs 4.174-4.179 below)

Whether there should be liability for complicity in the commission of inchoate or preliminary offences (paragraphs 4.180-4.184 below)

Whether any of the present, and if so which, inchoate offences should apply to the offences of assisting or encouraging crime envisaged in this Paper (paragraphs 4.185-4.187 below)

Punishment for the new offences (paragraphs 4.188-4.190 below)

Complicity in summary offences

4.171 In the passage through Parliament of the Criminal Attempts Bill, as it then was, concern was expressed regarding the potential proliferation of cases in the magistrates' courts if a charge of attempting to commit a summary offence was allowed to lie.[689] It is arguable that to allow charges involving other inchoate offences, including conspiracy and incitement, and in future, assisting or encouraging crime, in relation to summary offences would be objectionable on precisely the same grounds. However, it is not difficult to think of cases of complicity in summary offences that involve persons who undertake and coordinate large-scale schemes of minor offences. It is obvious that such schemes are significantly more serious matters than the individual offences they entail, as, for example, in *Curr*.[690] In that case, the defendant lent money to women holding family allowance books against the security of the holder's book containing vouchers signed by her to a value greater than the sum of the loan. He then employed a woman other than the signatory to cash the signed vouchers at a Post Office. He was charged, *inter alia*, with soliciting a woman to commit an offence under section 9(b) of the Family Allowance Act 1945. It was said that he solicited her to obtain on his behalf from the Post Office money as on account of an allowance knowing that it was not properly receivable by her. *Curr* was acquitted by the application of a rule as to mens rea that we propose should be reformed.[691] The Court of Appeal reached that conclusion reluctantly and in terms that did not conceal their view of the seriousness of his conduct: it was "quite plain that the dealings of [the defendant] were highly objectionable, and the assistant recorder...in his summing-up he spoke of preying on these women with large families, and he finished up his direction to the jury with words to this effect: 'If you are getting interest at 800 per cent. per annum it is not bad, is it? That is what the prosecution

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689 See eg, *Hansard* (HC), 31 March 1981, 6th series, vol. 2, cols. 215-217.

690 [1968] 2 QB 944.

691 See paragraphs 2.128 and 4.155 above.

say here, that the whole system was corrupt,' and the language there used was no whit too strong."[692]

4.172 According to the present structure of the law, instances of accessoryship and attempt do not give rise to this issue as one is an accessory to, or attempts to commit, an offence that can only take place once. An instance of incitement, on the other hand, might eventually relate to any number of offences. For example, the advertisement placed in *Invicta Plastics* v. *Clare*[693] could have encouraged any number of motorists to contravene the relevant Wireless Telegraphy legislation.[694] The new offence of encouraging, which does not depend on the ultimate commission of the offence assisted or encouraged, could therefore, relate, in any particular instance, to crimes by many people. It would fail to meet some serious schemes if it were limited to indictable offences. Similarly, the proposed offence of assistance will not depend on the commission of a particular offence by the party assisted as is presently the case in an instance of aiding and abetting. Thus, the party who hands his car and keys over to a group of fifteen year olds with a known propensity for driving, though not necessarily for driving in a dangerous manner, ought to be punishable for assisting their offences of driving without a licence, and driving while uninsured, both of which are summary offences, under sections 87 and 143 respectively, of the Road Traffic Act 1988.

4.173 We do not think that it would be seriously questioned that such cases should be prosecutable. However, we go further, and suggest that once conduct has been decided to be criminal, even only as a summary offence, that should be enough to justify the prosecution of those who assist or encourage that conduct. That appears to us to be a straightforward matter of principle. We are, however, aware that concern may be generated among magistrates and those responsible for the administration of magistrates' courts, regarding a potential increase in workload. We therefore invite comment both as to the very suitability of a charge of assisting or encouraging the commission of a summary offence, and on whether limits might be placed on the prosecution of such charges in magistrates' courts.[695]

Impossibility

4.174 It was originally the law that, if the other requirements of the offence are fulfilled, a person could be guilty of incitement even though the crime incited was impossible of achievement.[696] However, the Court of Appeal concluded in *Fitzmaurice*,[697] following

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[692] *Per* Fenton Atkinson J at p. 950C-D.

[693] [1976] RTR 251.

[694] See paragraph 2.130 above.

[695] We are not attracted to the procedure, once used for such purposes, that charges should be subject to the approval of the Director of Public Prosecutions. The advent of the Crown Prosecution Service has rendered that provision otiose. Better protection from excessive prosecuting is now provided by the internal disciplines of the CPS itself.

[696] *McDonough* (1962) 47 Cr App R 37: D incited P to handle stolen lamb carcasses allegedly held in a coldstore, when in fact the store was empty.

the decisions on attempt in *Haughton v Smith,*[698] and on conspiracy in *DPP v Nock,*[699] that it was a principle of the common law applying to all inchoate offences, and therefore to incitement, that if the principal crime envisaged was impossible of commission there could be no liability for an inchoate offence in respect of it. The question does not arise in the present law of aiding and abetting, because of the requirement that the principal offence be actually committed; but since we envisage both of the new offences of encouraging and of aiding crime as being inchoate in nature it must be reconsidered here.

4.175 Much depends, in the present law of incitement, on the specificity with which the principal crime is envisaged, and on whether that crime is truly impossible. Thus, the conviction in *McDonough*[700] was explained in *Fitzmaurice* on the grounds that "though there may have been no stolen goods or no goods at all which were available to be received at the time of the incitement, the offence of incitement to receive stolen goods could nevertheless be proved because it was not impossible that at the relevant time in the future the necessary goods would be there";[701] and in *Fitzmaurice* itself the principle that the Court of Appeal recognised did not lead to an acquittal because, although the robbery that D incited P to take part in was (unknown to D) a charade, and never intended to take place, it was not *impossible* for such a robbery to have occurred.[702]

4.176 Such fine distinctions indicate the difficulty of applying the *Fitzmaurice* rule. More fundamentally, however, we question whether the rule is sound as a matter of principle. The same rule, as applied in the case of attempt and of conspiracy,[703] has been reversed by statute;[704] and it seems likely that a similar step would have been taken in respect of incitement but for a mistaken belief that the common law principle enunciated in *DPP v Nock*[705] did not extend to that crime.[706] The rationale of these legislative interventions was that the justification for the existence of inchoate offences lies in the anti-social and criminal intentions or inclinations of the secondary party, which he carries into action; and those intentions are none the less culpable because they are based on mistaken beliefs about the relevant facts. Similarly, the offence of assisting crime is based on the defendant's

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[697] [1983] QB 1083.

[698] [1975] AC 476.

[699] [1978] AC 979.

[700] n. 696 above.

[701] [1983] QB at p. 1091A.

[702] [1983] 1 QB, at p. 1092D-E.

[703] See nn. 698 and 699 above.

[704] Criminal Attempts Act 1981, sections 1(2) and 5(1).

[705] n. 699 above.

[706] See Law Commission Report Law Com No 102 (1980), and the discussion in *Fitzmaurice* [1983] QB, at p. 1090C-D.

knowledge or belief that what he does will assist in the commission of a crime;[707] and the offence of encouraging crime on the defendant's intention that a crime should be committed by others.[708] While we invite comment on this point, as at present advised we see no reason why, if the defendant fulfils those requirements, he should escape liability because the commission of that crime is, unknown to him,[709] impossible.

4.177 The particular structure of assisting and of encouraging crime however raises one issue that has no direct parallel with those considered in relation to "impossible" attempts, and which must be commented on separately. Both of the new offences will require knowledge or belief on the part of the defendant as to the legally culpable state of mind of the principal.[710] What then of offences that are "impossible" not in the sense discussed in connection with attempt, that the actus reus cannot in fact be committed; but in the sense that the principal does not in fact have the culpable state of mind necessary for the offence, though the "accessory" believes that to be the case?

4.178 The point can be illustrated by cases that are the converse of those used in paragraph 4.60 above to illustrate the basic principle that the accessory is not liable if he, wrongly, believes the principal to be acting innocently. For instance, D might keep watch while P removed property from X's house, not realising that P claimed ownership of the property and thus was not or might not be acting dishonestly; or D provides a document for use by P which D knows to be a forgery but which, unknown to D, P thinks to be genuine. Such problems will hardly be frequent in practice. It is unlikely that in these or similar cases the true state of P's mind will not be known to D. And, if such cases did arise, they would be unlikely to be detected or prosecuted. Nonetheless, we must resolve the issue of principle of whether it should be possible to convict of assisting or encouraging crime where the defendant has the necessary belief as to the principal's culpable state of mind, but that belief is in fact false.

4.179 While we ask for separate comment on this point, our provisional view is that the principle should hold good in this case, and that the essence of the new offences, like any other inchoate offences, is the anti-social and criminal *intentions* of the defendant. The implementation of those intentions remains, therefore, something of which the law should take notice even in cases where actual assistance in the commission of crime is impossible because the intended principal, contrary to the belief of his would-be accessory, lacks the necessary criminal intent.

Complicity in the commission of inchoate and preliminary offences

4.180 The extent to which the present offences of aiding and abetting[711] and incitement[712]

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[707] See paragraph 4.99(1) above.

[708] See paragraph 4.163(1) above.

[709] If the defendant knows of the impossibility, as a matter of fact, it will not be the case that he intends or believes that the principal crime will take place.

[710] See above, paragraphs 4.99(1)(b) [assisting crime]; 4.163(1)(c) [encouraging crime].

[711] See paragraph 2.103 above.

can be committed in respect of the substantive offences of attempt, incitement and conspiracy is far from clear. The state of the present law owes more to the complicated interaction of the already vague rules of the common law offences, together with the fact that an aider or abettor technically commits the offence that he aids,[713] than to any clear policy aim. The present exercise gives an opportunity to reconsider the effect of putting the whole of the law of complicity on to an inchoate basis.

4.181 Only in the most special circumstances[714] can a charge of inciting an attempt be apt, because normally a person who incites what turns out to have been only an attempt will have incited the completed crime. The same is true of the new offence of assisting crime, which turns on acts done with the intention or belief that the completed crime will be committed. It is more important to make the law comparatively simple than to cover odd and unusual cases; and we therefore propose that it should not be possible to charge a person with either assisting or encouraging an attempt.

4.182 Incitement to conspire no longer exists, having been abolished by section 5(7) of the Criminal Law Act 1977, and for the same reasons as led to that statutory rule we do not propose the creation of an offence of encouragement to conspire. It is possible to conceive of cases where a person assists a conspiracy without assisting *in* that conspiracy in the sense of taking part in it;[715] but, again, we doubt whether the law should extend to a case where the defendant is not sufficiently involved to be himself considered a conspirator.

4.183 The same considerations apply to the application of the new offences to themselves. Where for instance the suggested offence is of assisting to assist; or encouraging to encourage; the defendant's conduct is in our view too remote from the commission of the principal crime for it to be justified to pursue him. The accused's conduct must be characterisable as the assistance or encouragement of that principal crime before the law should extend to it.[716]

4.184 Our provisional conclusion is, therefore, that neither the offence of assisting crime nor the offence of encouraging crime should be able to be committed in respect of any inchoate or preliminary offence.

Assisting or encouraging crime as the subject of other inchoate offences

4.185 This question is the reverse of that discussed in paragraphs 4.180-4.184 above: whether it should be possible to attempt to assist or encourage crime, or to conspire to

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[712] See paragraphs 2.138-2.141 above.

[713] See paragraph 2.105 above.

[714] See the hypothetical case referred to in paragraph 2.141 above.

[715] See the example given at the end of paragraph 2.103 above.

[716] This approach has also the technical advantage of avoiding the complications that have beleaguered the present, and obscure, offence of "incitement to incite": see paragraph 2.140 above.

commit those offences. We have already provisionally concluded, in paragraph 4.183 above, that it should not be possible to assist to assist, etc.

4.186 The present law relating to these issues is, as it applies to aiding and abetting, rendered unduly complex and technical by aiding and abetting being not a separate inchoate offence, but in law only a mode of committing a substantive offence.[717] By contrast, there would seem to be no such technical barrier to charges of attempt or conspiracy in relation to incitement, but we are not aware of any authority in which those possibilities have been explored. However, with the whole of the law of complicity put on an inchoate basis, it is possible to deal with the matter quite shortly. Cases might arise both of attempt to assist or incite,[718] and of conspiracy to assist or incite.[719] We see no obvious reason of policy, granted the existence of the crimes of attempt and conspiracy, why they should not apply in such cases; and we therefore provisionally conclude that there should be no special rule preventing the application of attempt and conspiracy to the proposed new crimes of assisting and of encouraging crime.

4.187 The availability of a conspiracy charge on the facts suggested above might perhaps be thought to evoke surprising comparisons with the limits that we have suggested should be placed on the liability of an individual in connection with crimes committed by others. That, however, is more of an indication of the wide range of the crime of conspiracy than a sign of any special feature of the particular offences now under review. We revert in paragraph 4.211 below to the position of the general law of conspiracy if those new offences were to be introduced.

Punishment

4.188 Since an aider and abetter commits the principal crime, he is liable to the maximum punishment provided for that crime. There are no recognised principles of sentencing that require a lower tariff to be contemplated in respect of a particular offence just because the defendant participated in it as an aider and abetter and not as a principal. An incitement is *triable* according to how the crime incited is triable. When tried summarily, the maximum penalty is that for the principal offence when tried summarily. When tried on indictment, however, the penalty is in the discretion of the court, whatever the maximum penalty for the principal crime.[720]

4.189 It has sometimes been suggested that, while the penalty for complicity should be linked to that for the principal offence, it ought to be lower than the latter penalty; on the assumption that secondary participation is either necessarily, or at least as a category, less culpable than participation as a principal. This policy is reflected in the Canadian Draft

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[717] See paragraphs 2.104-2.107 above.

[718] E.g., D sends a letter to P urging him to murder X; or, knowing or believing that P already intends to murder X, giving him advice as to how to do it. The letter is lost in the post.

[719] D1 and D2 agree together to send such a letter to P.

[720] See paragraph 2.138 above.

Code, published by the now defunct Law Reform Commission of Canada,[721] clause 4(4) of which states:

> ... Everyone is liable for attempted furthering of a crime and is subject to *half the penalty for that crime* if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.[722] [emphasis added]

4.190 We agree that the maximum penalty for complicity should relate to that for the principal crime in which the defendant has become involved: there is, in particular, no rational justification for the present rules, which are largely or entirely a matter of historical accident, in relation to incitement. As at present advised, however, we envisage difficulties in making the *maximum* penalty for a complicity crime less than that for the principal crime itself. Cases can easily be imagined where the assister, and certainly the encourager,[723] may be equally or more culpable than the principal. We therefore provisionally conclude that the maximum penalty for both of the complicity offences should be the same as that for the principal crime, and that differences in the level of culpability should be left to be recognised in the exercise of the court's sentencing discretion; as at the moment differences in the level of culpability are recognised between very different examples of a single principal crime carrying one undifferentiated maximum sentence, such as theft.

OTHER ISSUES ARISING FROM OUR REVIEW OF THE LAW OF COMPLICITY

Introduction

4.191 In this section we review a number of issues that have been thought to cause difficulty in connection with the present law of complicity, and discuss, and ask for readers' opinions on, the impact on those issues of the provisional proposals put forward earlier in this Consultation Paper. Those issues are

> Should there be a separate offence of *procuring* the commission of a crime? (see paragraphs 4.192-4.197 below)
>
> Should there continue to be liability for the commission of crime as part of a "joint enterprise" (see paragraphs 4.198-4.201 below)
>
> What rules, if any, should apply to cases where the principal commits the *actus reus* of an offence, but is not guilty of the offence because of lack of *mens rea*; and the

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[721] Report 31, *Recodifying Criminal Law*, (1987). See generally Appendix, Part 2, paras. 4.8ff.

[722] Appendix, Part 2, para. 4.10. Where the conduct specified by the definition of the offence *is* completely performed by the party helped, advised etc, the helper is subject to the penalty for that crime. See generally, Appendix, Part 2, paras. 4.8ff.

[723] Fagin might well fall into that category. A less dramatic example is provided by the basic facts of *Curr* [1968] 2 QB 944, where the complicitor in fact organised the dishonest scheme, at the expense of the hard-pressed women who were prevailed upon to act as the instruments of his fraud.

"complicitor" is regarded as morally culpable in respect of the principal's acts: the "*Cogan and Leak*" problem (see paragraphs 4.202-4.210 below)

The effect of our provisional proposals on the present law of conspiracy (see paragraphs 4.211-4.215 below)

The effect of our provisional proposals on the present law of possession offences (see paragraph 4.216 below)

Aiding and abetting a contempt of court (see paragraph 4.217 below)

What should the future law be with regard to the present specific statutory offences of incitement and procurement? (see paragraphs 4.218-4.220 below)

The accomplice rule in the law of corroboration (see paragraph 4.221 below)

Procurement

4.192 According to the view of section 8 of the Accessories and Abettors Act 1861 that was adopted in *A-G's Reference (No 1 of 1975)*, "procurement" is a type of aiding and abetting distinct from either aiding or counselling.[724] We have provisionally concluded that the approach of *A-G's Reference (No 1)* should be abandoned.[725] That does not mean, however, that there may not be cases that should fall within the law of complicity, but which cannot be accommodated, or at least cannot be accommodated without distortion, within the two offences of assisting and of encouraging crime; and which might be better treated under a separate offence expressed in terms of procurement.

4.193 In *A-G's Reference (No 1)* the Court considered "procurement" to be the head of liability available to meet the unusual[726] case where there was no "meeting of minds" between the accessory and the principal: there, D "laced" P's drink, causing him to commit the (strict liability) offence of driving with excess blood alcohol.[727] Although it is arguable that that conduct could be described as "assisting" on D's part,[728] we think that it could cause misunderstanding if the offence as defined in paragraph 4.99 above were applied to this case. "Assistance" more naturally applies to the case where D's help is given towards an enterprise in which P was aware he was engaged. P does not need to know of the assistance: to take the example that we gave in the Code Report, D "assists" where, knowing that P has made plans to murder X, he takes steps unknown to P to ensure that X is not warned of the

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[724] See paragraphs 2.10-2.14 above.

[725] See paragraphs 4.9-4.11 above.

[726] The case is unusual not least because it seems to be the only reported example of accessory liability in which there is a real issue as to whether the accessory caused the commission of the principal crime: see paragraphs 2.15-2.22 above.

[727] Road Traffic Act 1972, section 6(1).

[728] *Pace* Williams, [1991] Crim LR 930. See further *Smith & Hogan*, p. 129.

danger.[729] However, the particular case of "procurement" arises where P is not only unaware of the "assistance", but also is unaware that he is doing the act that constitutes the principal crime; so that it is plausible to say, as in the example just given it is not, that D "caused" the commission of that crime.[730]

4.194 Nor in a case such as that just mentioned is it correct to say that D "encouraged" P to commit the offence. Quite apart from the linguistic oddity of saying that A encourages B to do an act of which B is unaware, there may well in such a case be no actual communication between P and D: as indeed was so in *A-G's Reference (No 1)* and in the other recent "lacing" case of *Blakely and Sutton*.[731] That conflicts with the requirement of the present law of incitement, which we think should be retained in a new offence of encouragement, that the "encouragement" must be brought to the attention of the principal.[732]

4.195 Offences of strict liability are virtually the only offences, and certainly the only significant offences,[733] that P can commit without knowing what he is doing, which would seem to be the only circumstance in which the present problem arises. The present offence of procurement covers cases where D is reckless as to the commission of such a crime by P,[734] as well as where the commission of the crime is D's purpose, and that would seem to be correct: where D laces P's drink to an extent that puts P over the legal limit of intoxication, D is culpable if he knows that P may drive as well as where he has as his purpose that P should drive while intoxicated.

4.196 These no doubt rare cases can be met by a provision to the effect that where an offence can be committed without fault on the part of the principal,[735] a person commits the offence of procurement if he does any act with the intent that it should bring about, or being reckless whether that act will bring about, the commission of that offence by another. We invite comment on this provisional proposal.

4.197 There are a number of statutory offences of procurement, principally procurement of sexual intercourse by the use of threat or deceit,[736] or on the part of a defective or other

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[729] Code Report, paragraph 9.20.

[730] See paragraph 2.21 above.

[731] [1991] RTR 405, discussed in paragraph 2.14 above.

[732] See paragraph 4.163(2) above.

[733] This analysis may also be true of offences of (objective) negligence. It would however in our view cause too much complication to try to provide a special rule for complicity in those very rare offences. Further, it would be much more plausible in such a case, than in a case of strict liability, to say that a complicitor did indeed assist or encourage the principal.

[734] See Bingham LJ in *Blakely and Sutton*, cited at n. 82 to paragraph 2.14 above.

[735] Cf paragraph 4.99(1)(b) above.

[736] Sexual Offences Act 1956, sections 2(1) and 3(1).

vulnerable person.[737] As in relation to the general law of complicity just discussed, "procure" implies the causation by the endeavours of the accused.[738] However, in these cases what is procured, intercourse outside marriage, is not itself criminal. Such offences are therefore not affected by the proposals that we make here.[739]

Joint enterprise

4.198 We discussed the present law on the doctrine of "joint enterprise", and the considerable difficulties in formulating its limits, in paragraphs 2.108-2.124 above. Not the least of those difficulties is that the doctrine has developed with only somewhat haphazard consideration of how it relates to the law of aiding and abetting. However, properly considered, the present doctrine of joint enterprise extends beyond liability for aiding and abetting.[740] D may be liable under this doctrine if he participates in an unlawful "venture" while contemplating a real and substantial risk that a *collateral* crime may be committed by P in the course of the venture; in the most usual case, accompanying P on a stealing expedition contemplating that P may use violence on someone encountered during the expedition. It may however also be noted that, although the reported cases have tended to involve ventures which are clearly criminal, such as burglary, the extent to which other enterprises, which less obviously threaten further criminal acts, might fulfil the requirements of "joint enterprise", is at present unresolved.

4.199 If it were to be accepted that the law of complicity should be reformed along the lines proposed in this Paper, with emphasis on the proof of acts of assistance with awareness of the principal crime, or knowing encouragement of that crime, and with the formulation of specific and limited special defences; then the justification, and need, to retain the further doctrine of joint enterprise comes into serious question. In most cases at present discussed under the heading of joint enterprise, the requirements of liability for assisting or encouraging crime will in fact be fulfilled. In particular, the present requirement in joint enterprise that D should foresee a real and substantial risk of P's commission of the principal crime[741] ensures that D would not avoid the "awareness" requirement in the offence of assisting crime. But there may be cases where, although D has joined the *venture*, with that level of awareness, he cannot properly be said in fact to have assisted in, or to have encouraged, the commission of the collateral crime by his companion: for instance, if P assaults a householder who unexpectedly returns to the house while D is upstairs ransacking the bedroom. We invite comment on whether, in such circumstances, D should be responsible only for the crimes that he has actually assisted or encouraged; and, with a clear and distinct law governing those

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[737] Ibid., sections 9 and 23(1).

[738] *Smith & Hogan*, p.464, n.11.

[739] See further, on statutory offences of procurement and the like, paragraphs 4.197 above, and 4.218ff below.

[740] See paragraphs 2.119-2.120 above.

[741] See paragraph 2.118 above.

activities, whether it is necessary to have to fall back on the vaguer common law rules of joint enterprise.

4.200 We invite comment, therefore, on whether, if the new offences of assisting and encouraging crime were to be adopted the doctrine of joint enterprise should be abolished. We however particularly invite comment as to whether there are thought to be cases that would not be brought within the new offences but which consultees consider should nevertheless be addressed by the present doctrine of joint enterprise or by some variation upon it.

4.201 A particular issue may be thought to arise in that respect in relation to the law of murder. The application of the doctrine of joint enterprise to the present law of murder has produced undoubted anomalies, but those anomalies are partly at least attributable to the retention of intention to cause grievous bodily harm as part of the mens rea of murder.[742] If the new offence of assisting crime[743] were applied to this case, it would be necessary for the assister to know or believe that the principal was going to commit the actus reus of the offence, that is to kill; and know or believe that the principal would do so intending either to kill or to cause serious harm. If the "assister" fell short of either of those requirements he might however be guilty of assisting in an assault committed by the principal in the course of killing. It may well be thought that that would be the right outcome, and that the present law extends liability for complicity in murder too widely. However, we invite comment on whether there should be special rules as to the liability of those who assist in acts on the part of others that result in the commission of murder.

The guilty accessory and the innocent principal

4.202 Cases can easily be imagined which look like the assistance or encouragement of "crime", but which do not in fact fall within the rules already discussed because no principal crime has been committed: for instance, D encourages P, an eight-year old child, to steal from a shop; or, to adapt the facts of *Curr*,[744] D encourages and assists P to make a claim on a public fund that is in fact, unknown to P, false; or D makes a room available to P so that P can have intercourse with Miss X, whom P believes to be under sixteen, but who is in fact over sixteen.

4.203 Such cases may often entail *principal* liability on the part of D through the operation of the doctrine of innocent agency.[745] Thus, in the case of the use of a child under the age of criminal responsibility to remove goods from a shop, D himself may well by that agency have dishonestly appropriated the goods so as to be guilty of theft. That solution is however not available where it is not possible to say, as a matter of fact, that D has committed the actus reus of the principal offence. For instance, the fact of sexual intercourse assumes

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[742] See paragraphs 2.121-2.123 above.

[743] As provisionally defined in paragraph 4.99 above.

[744] [1968] 2 QB 944; see paragraph 2.128 above.

[745] See paragraph 1.15 above.

intercourse by the actual actor and not by proxy, and therefore D, the panderer, cannot be guilty of rape or unlawful intercourse when the intercourse is actually committed by P.[746] And, on a somewhat different level, boys under eighteen cannot be guilty of buying alcohol "on" licensed premises when they send an adult into the public house to make the purchase for them.[747]

4.204 However, in many cases where even the doctrine of innocent agency cannot be used to convict the principal, inability to convict the non-acting accessory does not, in our view, give rise to serious concern. If it is desired to impose criminal liability on a careless giver of directions to a bus-driver,[748] or on youths who find an ingenious way of circumventing the drafting of the Licensing Acts,[749] then the statutory offences involved should be extended, in the light of the policy of that particular statutory regime, to encompass them as principals. The suggested gaps in the law that continue to give concern cannot, however, be dismissed so easily, since they are cases, admittedly infrequent in their appearance at least in the law reports, where the "accessory" appears to be seriously morally culpable, and there is no statutory offence that can easily be adapted to include his conduct.

4.205 The problems of the present law were described in paragraphs 2.43-2.46 above. Broadly speaking, we are concerned with cases where what the "principal" does, in his particular state of mind, does not amount to a criminal offence on his part, and therefore neither in the present law of accessoryship nor in the law that we propose can it be the foundation of liability for complicity in crime; but that innocence on the principal's part is brought about only because of a state of mind culpably induced by the "accessory". That will be the case, conspicuously, either where the principal has a defence of duress resulting from threats by the accessory;[750] or where the principal is acting under a mistake of fact induced by the accessory.[751]

4.206 In the Draft Code[752] we sought to reflect what appears to be the law as envisaged in *Cogan and Leak* by treating such cases as an extended and special category of innocent agency. We cannot however recommend that solution as part of a law reform project. The solution through innocent agency is, however, highly artificial. It simply is not the case that Mr Leak had "intercourse" with his wife through the agency of Mr Cogan, or that Mr Bourne had connection with the dog; and it strains the patience of the jurors who have to decide these cases to ask them to proceed on what purports to be a factual basis, but which in truth goes

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[746] This is the difficulty about certain of the solutions proposed to the problem that arose in *Cogan & Leak*: see paragraph 4.206 below.

[747] *Smith & Hogan*, p.125, citing *Woby v B & O* [1986] Crim LR 183.

[748] See *Thornton v Mitchell*, paragraph 2.42 above.

[749] See *Woby v B & O*, cited in n. 747 above.

[750] As on the facts of *Bourne* (1953) 36 Cr App R 125.

[751] As on the facts of *Cogan and Leak* [1976] QB 217.

[752] Clause 26(3)(a); and Code Report, paragraphs 9.13-9.15.

against all proper description of the acts that took place.[753] If such cases are to be addressed at all, a special rule, which acknowledges the structurally secondary nature of the morally guilty party's involvement, must be produced.

4.207 A prime danger of such a rule is that, in its anxiety to meet cases of the type just discussed, it will reach too far. For that reason, we doubt whether it can be right (though we invite views on the point) to adopt a general rule that would attach liability for "the abetting or counselling of a mere actus reus".[754] The physical element of many crimes is expressed in very general terms, the acts in question only coming within the legitimate control of the criminal law if performed in a criminal state of mind. For instance, the recent decision in *Gomez*[755] has demonstrated the wide range of acts that are included within "appropriation" in theft. We cannot think that it would be right to create "accessory" liability in any case where a person encouraged such an act, even though the actor himself lacked, or was believed by the encourager to lack, any state of mind that would make his act criminal. Rather, we suggest the following approach.

4.208 The first option is simply to do nothing. It might well be argued that the problem is sufficiently limited in occurrence for what are necessarily going to be somewhat complicated provisions not to be justified.

4.209 If that view does not commend itself, we suggest that the emphasis should be on the *encouragement* by D of acts by P. We doubt very much whether the particular objection to D's conduct that is thought to require a response on the law's part will ever arise in a case where D has merely assisted, and not positively encouraged, P's acts. And that particular objection essentially arises when there has been either threats or deceit on D's part. We therefore provisionally propose that there should be a special offence of encouragement,[756] where D solicits, etc, acts on P's part which if performed will only fail to involve the commission of an offence by P because either

(i) P can adduce a defence of duress based on threats made to him by D; or

(ii) P is acting under a mistake of fact and that mistake has been intentionally brought about by D.

4.210 This approach would catch cases like *Bourne* and *Cogan & Leak*. It would also impose liability on the facts of a case like *Curr*[757] if the "Mr Big" had persuaded the claimants that they were entitled to payments from public funds when in fact they were not.

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[753] See further paragraph 2.45 above.

[754] *Smith & Hogan*, p.153.

[755] [1992] 3 WLR 1067. For further examples of how conduct that forms the "actus reus" of a criminal offence may, without the necessary mens rea, be common, natural and entirely innocent see our Consultation Paper No 127 (1992), *Intoxication and Criminal Liability*, at paragraphs 6.39-6.40.

[756] Compare the definition of the main offence proposed in paragraph 4.163(1) above.

[757] See paragraph 4.202, n. 744, above.

However, it would not, we think, extend the law unduly widely in other directions.[758] We however ask for critical comment on this approach to what the present law has found to be an intractable problem.

The effect of our proposals on the present law of conspiracy

4.211 We have already indicated[759] that we do not in this study seek to reopen the present law on conspiracy to commit an offence. Nevertheless, we note, and agree with, the view that even though the continuation of an offence of conspiracy may be a necessary evil, it is desirable that it should only be used as a last resort. That is because, by resting solely on the presence of an agreement in relation to the commission of an offence, the crime is potentially very wide, and theoretically capable of encompassing conduct that is very remote from any actual commission of an offence.

4.212 We pointed out in Part III above that two of the widest extensions of the crime of conspiracy in recent times, in *Hollinshead*[760] and in *Anderson*,[761] involved facts where the essence of the complaint against the defendants was that they had assisted or encouraged the commission of offences by others. Conspiracy had however to be resorted to because no principal crime had in fact been committed. If the scheme of offences that we provisionally propose were to be adopted, such conduct could be prosecuted for what it properly is, the assistance or encouragement of crime.

4.213 That would have two benefits. First, the enquiry into the accused's liability would focus on whether he had indeed assisted or encouraged, with the necessary knowledge of the principal crime, including the intentions of the principal, rather than taking refuge behind the necessarily more general concept of agreement on a course of conduct that will amount to or involve the commission of any offence.[762] Adoption in such a case of the scheme here suggested would also enable the clear identification of cases where the defendant should be exculpated although prima facie coming within the limits of the offence. Thus, it is of interest that the House of Lords in *Anderson* were clear that a person who joined a conspiracy with the intention of frustrating the criminal purpose of the other parties should not be liable as a conspirator. That outcome was however reached by reliance on "the mens rea implicit in the offence of statutory conspiracy";[763] we venture to suggest that a specifically formulated defence, such as those discussed in paragraphs 4.123-4.131 above, would both

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[758] It should also be noted that where the principal's offence is one of strict liability the promoter may be liable for its commission, even though the principal has no culpable state of mind, under our proposed offence of procurement: see paragraph 4.196 above.

[759] See paragraphs 1.20-1.22 above.

[760] [1985] AC 975: the "black box" case, involving the supply of devices to enable the defrauding of the electricity authorities.

[761] [1986] AC 27: supply of equipment to help in a scheme of escape from prison that was not pursued.

[762] See Criminal Law Act 1977, section 1(1).

[763] [1986] AC at p. 39C.

more clearly identify this as a ground of excuse and render it less a matter of judicial discretion.

4.214 The second benefit would be for the law of conspiracy itself. That is particularly so in respect of the offence of conspiracy to defraud. In order to convict those who manufactured and circulated the "black boxes", the only use of which was to defraud the electricity authorities, the House of Lords in *Hollinshead* had to characterise the agreement so to act as itself being an agreement to "defraud", even though the acts and agreement of the accused did not involve any fraud perpetrated by them upon the electricity authorities or upon anyone else. The breadth of that conclusion has caused some concern.[764] It is suggested that it would not have been necessary to have gone so far if the conduct of the manufacturers and sellers of the devices could have been investigated under the terms of an (inchoate) offence of assisting or encouraging crime. It would of course have been necessary to show that the accused did indeed do acts that were likely to assist the commission of offences of fraud, with the knowledge or belief that those offences were going to be committed.[765] That, however, would be beneficial in concentrating attention on the culpable acts and state of mind of the accused, rather than on the much vaguer criterion of agreement to defraud.

4.215 If a more effective law of complicity were to be introduced it might be possible, once there was proper experience of its operation, to return to the question of whether the ambit of conspiracy to defraud could be reduced, to exclude cases that were properly ones of complicity. We do not make any proposals to that effect as part of this study, but we do suggest that it can only be beneficial if prosecutors have available clearly defined offences of complicity, which are not limited by the present requirement that the principal offence must actually be committed. We would expect that prosecutors would seek to employ such offences, that addressed the actual fault of the accused, rather than to continue to use the vaguer and more controversial law of conspiracy that at the moment has to supply some of the gaps in the law of aiding and abetting.

The effect of our proposals on possession offences

4.216 Possession offences[766] are most commonly used to meet particular situations of incipient criminality that are not caught by the law of attempt; but the offences may also be used to address cases where the accused intends to supply material for the commission of offences by others.[767] The essence of such provisions is that they are specific statutory rules, formulated in cases where it is seen to be necessary to intervene in particular forms of

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[764] The approach that prevailed in *Hollinshead* was particularly vigorously criticised, on grounds of its potential width, by the strong Court of Appeal that took a different view in that case: see [1985] AC at p.984D-E.

[765] See paragraph 4.99 above and, in relation to these particular facts, paragraph 4.61 above.

[766] See paragraphs 1.23-1.24 above.

[767] E.g. section 17 of the Forgery and Counterfeiting Act 1981: possession of counterfeiting materials that the accused intends to use or to permit any other person to use.

criminal conduct at an early stage. It is outside the scope of this project to review the need for or use of such offences. Nor do we expect, in view of the somewhat different focus of the general offences that we propose, that the introduction of those offences will lead to the abolition of many or any of the existing possession offences.

Aiding and abetting a contempt of court

4.217 Secondary involvement in a contempt of court is sometimes referred to as the aiding and abetting of that contempt.[768] That however is merely a convenient way of referring to the fact that a person who, with knowledge of the making of an order by the court, encourages or assists in the breaking of it, will himself be in contempt.[769] As such, it addresses a special problem, different from the general law of complicity. We do not see our proposals as affecting this branch of the law, and we say no more about it.

Statutory offences of assistance or incitement

4.218 A number of statutes create offences that use concepts similar to those employed in the common law of complicity. Examples are incitement to commit certain offences[770] or to commit acts that are not themselves offences;[771] procurement of various acts;[772] aiding, assisting or facilitating various acts;[773] or the creation of principal liability where an offence by a company is committed with the consent or connivance of any director or other officer.[774]

4.219 Most of these offences use these expressions in their primary, factual sense: aiding an act, or inciting another to do that act. We do not seek to disturb the meaning that those words have or have attained in their context, and we do not think that any confusion will be caused by our proposed revision of the common law of incitement and complicity.

4.220 There are, however, a number of cases where statutes use the expression "aid, abet, counsel or procure", presumably with the direct intention of attracting the common law of

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[768] E.g. *Halsbury's Laws* (4th edition), vol 9, paragraph 85; Arlidge and Eady, *The Law of Contempt* (1982), paragraph 2-50.

[769] Arlidge and Eady, loc. cit.; *A-G v Newspaper Publishing Plc* [1988] Ch 333 at p.377C, per Lloyd LJ.

[770] E.g. murder, under section 4 of the Offences against the Person Act 1861; perjury under section 7(2) of the Perjury Act 1911.

[771] See the examples given in paragraph 92, n. 143, to WP No 50.

[772] See paragraph 4.197 above.

[773] E.g. escaping from prison (Prison Act 1952, section 39); acts of sexual discrimination (Sexual Discrimination Act 1975, section 42(1)); misuse of a computer to facilitate the commission of various offences (Computer Misuse Act 1990, section 2).

[774] E.g. Trade Descriptions Act 1968, section 20(1); Health and Safety at Work Act 1974, section 37(1).

complicity as referred to in section 8 of the 1861 Act.[775] We propose that that reference should be replaced by reference to the new law of assisting and encouraging that we propose to replace the formulation in section 8. We invite comment on whether that approach is thought inappropriate in any of these cases.

The accomplice rule in the law of corroboration

4.221 It is at present the law that a trial judge must give the jury a "corroboration warning", in formalised terms, in respect of the evidence of any "accomplice".[776] The definition of accomplice would appear to be the same as in the common law of "aiding and abetting". If that concept were abolished in favour of the new offences that we propose, then consideration would have to be given to the effect of that change on the "accomplice rule". We do not pursue that question further as we have proposed the abolition of the accomplice rule,[777] a proposal that has been warmly welcomed by a large majority of those working in the criminal law.

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[775] Foreign Enlistment Act 1870, section 12; Explosive Substances Act 1883, section 5; Submarine Telegraph Act 1885, section 3(5); Perjury Act 1911, section 7(1); Incitement to Disaffection Act 1934, section 2(1); Army Act 1955, section 68A(1); Air Force Act 1955, section 68A(1); Naval Discipline Act 1957, section 41(1); Suicide Act 1961, section 2(1); Gas Act 1965, section 21(4); Internationally Protected Persons Act 1978, sections 1(2)(b) and 1(3)(b); Magistrates' Courts Act 1980, section 44(1); Civil Aviation Act 1982, section 64(5); Representation of the People Act 1983, sections 60(1), 75(5)(a) and 92(1); Road Traffic Regulation Act 1984, section 119; Elections (Northern Ireland) Act 1985, section 3(7); Prohibition of Female Circumcision Act 1985, section 1(b).

[776] Corroboration of Evidence in Criminal Trials (1991), Law Com No 202, at pp. 32-33. The rule does not appear to apply to the evidence of *inciters*, save to the extent that they are also counsellors for the purpose of aiding and abetting.

[777] *Ibid.*, at paragraph 3.29.

PART V

ISSUES FOR COMMENT

5.1 In Part IV we suggested a new scheme to meet the conflicting demands of, on the one hand, the need to provide an efficient and clearly-defined means of controlling those who culpably involve themselves in the commission of crime by others; and, on the other hand, the need to formulate such rules in terms that do not impede or threaten legitimate social activities. Comment is invited on the balance that we have attempted to strike, and on the means proposed for implementing that balance.

5.2 We have set out our provisional proposals in some detail, not in any way with the intention of forestalling debate, but rather because we think that readers are more likely to identify, and to advise us upon, the objections to our scheme if the way in which the scheme will operate, and its impact in certain cases of particular difficulty, is made as clear as possible. We therefore invite critical comment on all aspects of what is said in this Paper. Without prejudice to that, however, we list below for the convenience of readers the specific issues that we identified in Part IV as being, in our judgement, of especial importance.

Basic structure of the law

1. Is it agreed that there should be separate consideration of encouraging the commission of crime on the one hand and assisting the commission of crime on the other? (paragraphs 4.8-4.11)

2. Is it agreed that a single set of rules should be formulated to deal with the issues at present addressed by the "counselling" element in aiding and abetting and by the crime of incitement? (paragraph 4.12)

3. Is it agreed that the offence of assisting should be put on to an inchoate basis, not requiring the commission of the principal crime before a conviction can be obtained (paragraphs 4.18-4.45)?

4. Comment is invited generally on our provisional definition of the new offence of assisting crime that is set out in paragraph 4.99, and on the elements of that offence that are explained in more detail in paragraphs 4.47-4.91.

5. An important preliminary question is whether the mental element of the offence should be stated in terms of purpose that the principal offence be committed (paragraphs 4.92-4.98); or knowledge or belief that the offence is being or will be committed (paragraphs 4.76-4.86). Do those who prefer the purpose test wish to propose knowledge or belief for any, and if so which, special categories of assisting (paragraph 4.98)?

6. Further particular issues are:

   6.1 Whether the offence is satisfactorily formulated in terms of "assistance", without further extensive definition (paragraphs 4.47-4.51)

6.2 Whether the offence should be subject to a *de minimis* principle (paragraphs 4.64-4.68)

6.3 Whether it should be possible to commit the offence of assistance by an omission (paragraphs 4.69-4.75)

6.4 Should there be special rules in the case of crimes of strict liability (paragraphs 4.89-4.91)

7. Comment is invited on the desirability and scope of the defences to the offence of assisting crime that are discussed in paragraphs 4.100-4.142. Readers are particularly invited to consider the extent to which their view of the need for such defences is affected by their opinion on question 5 above.

8. Comment is invited generally on our provisional definition of the new offence of encouraging crime, which is set out in paragraph 4.163, and the elements of which are explained in paragraphs 4.143-4.162.

9. Are the defences suggested to the offence of encouraging crime satisfactory? Should further defences be considered? (paragraphs 4.165-4.169).

10. Should there be limits on the principal offences in respect of which it will be possible to commit the offences of assisting or of encouraging crime? In particular, should the new offences extend to summary offences? (paragraphs 4.171-4.173).

11. What should be the effect of the principal offence being impossible of commission? (paragraphs 4.174-4.179)

12. Is it agreed that neither the offence of assisting crime nor the offence of encouraging crime should be able to be committed in respect of any inchoate or preliminary offence, such as attempt, conspiracy, or the new offences themselves? (paragraphs 4.180-4.184)

13. Should it be possible to attempt or to conspire to commit the new crimes? (paragraphs 4.185-4.187)

14. Should the maximum punishment for the new offences be the same as for the particular principal crime to which they relate in a given case, or should some other, and if so what, regime of punishment be adopted? (paragraphs 4.188-4.190)

15. Should there be introduced a further offence of "procurement", in the terms suggested in paragraph 4.196, or in any other terms?

16. Should the doctrine of joint enterprise be abolished? If it is thought that it should remain, in conjunction with the proposed new offences, to what cases should it be directed? (paragraphs 4.198-4.201)

17. Should a special offence be introduced to deal with the problem discussed under the heading of the guilty accessory and the innocent principal? If so, should that offence be in the terms suggested in paragraph 4.209, or in some other terms?

APPENDIX OF FOREIGN JURISDICTIONS

PART 1: AUSTRALIA

PART 2: CANADA

PART 3: NEW ZEALAND

PART 4: THE UNITED STATES OF AMERICA

APPENDIX

PART 1: AUSTRALIA

Introduction: The Constitutional Position

1.1 Under the Australian constitution of 1900, the legislative powers of the Parliament of the Commonwealth are restricted to certain fields. Section 51 allows Commonwealth legislation in such matters as foreign and interstate trade, taxation, defence, bankruptcy, intellectual property, marriage, divorce, and industrial conciliation and arbitration. The residue of legislative authority is retained by the individual States.[1] Penal offences can be created by the Commonwealth only as an incident to the exercise of one of the certain specific powers reserved to it by the Constitution.[2] Of the states, Queensland, Western Australia and Tasmania have adopted a regime of criminal regulation in the form of a code, while New South Wales, Victoria and South Australia remain common law jurisdictions. Of the more significant federal jurisdictions, the Australian Capital Territory is governed largely by the law of New South Wales and is thus subject to the common law, while the Northern Territory has a code based loosely on those of Queensland and Western Australia.

The Commonwealth Crimes Act

1.2 The Crimes Act 1914, as well as creating specific federal offences, contains other provisions of a more general nature. Among this latter category, section 5 deals with secondary liability:

> **Aiders and Abettors.** (1) Any person who aids, abets, counsels, or procures, or by any act or omission is in any way directly or indirectly concerned in, or party to, the commission of any offence against any law of the Commonwealth or of a Territory, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly.

The provision largely echoes section 8 of the (England and Wales) Accessories and Abettors Act 1861. The second limb of the section (dealing with those who are "directly or indirectly knowingly concerned in, or party to, the commission of any offence...") appeared to create a species of accessorial liability unknown at common law. However, the courts initially refused to recognise that these words added anything to the notion of aiding and abetting, etc.[3] More recently, the phrase has been construed as a separate type of charge,[4] the test

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[1] See A.J. Peaslee, *Constitutions of Nations* (Vol. II, 3rd ed., revised, 1966); Sir William Dale, *The Modern Commonwealth*, (1983), pp. 197-204.

[2] See B. Fisse, *Howard's Criminal Law* (5th ed., 1990), Ch. 1, and P. Gillies, *The Law of Criminal Complicity* (1980), p.23. The Commonwealth Crimes Act 1914 creates a number of offences correlative to Commonwealth powers, in such fields as crime against government, the administration of justice, espionage and official secrets. Other Commonwealth criminal statutes are operative in the fields of currency, aviation, taxation and torture: see R. Watson & A. Watson, *Australian Criminal Law Federal Offences* (1985).

[3] *Walsh* v. *Sainsbury* (1925) 36 CLR 464, at pp. 476-7.

for "knowing[] concern[]" being full knowledge of the relevant facts; knowledge may be inferred from the behaviour of the defendant.[5]

1.3 Incitement is considered at section 7A of the same Act:

> **Inciting to or urging the commission of offences.** If any person -
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> (a) incites to, urges, aids or encourages; or
>
> (b) prints or publishes any writing which incites to, or urges, aids, or encourages,
>
> the commission of offences against any law of the Commonwealth or of a Territory or the carrying on of operations for or by the commission of such offences, he shall be guilty of an offence.

The only notable point of departure from English common law is the apparent creation of an inchoate form of "aiding" in section 7A(a).[6] At state level, incitement is treated as a common law misdemeanour in those states where the criminal law has not been enacted in a comprehensive code.[7] Strangely, the criminal codes themselves do not refer to a general offence of incitement; as such, the stance of the Code states on this matter is difficult to divine. The Code provisions of those states concerning secondary liability are examined in the following paragraphs.

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[4] Which seems to be the linguistically logical reading of the section. Indeed, in *Given* v. *Pryor* (1979) 39 FLR 437; 24 ALR 442, Franki J, discussing the notion of knowing concern, did not once allude to the concepts of aiding, abetting counselling or procuring.

[5] "I am satisfied that the defendant was so closely involved in the [prohibited activity] that he was knowingly concerned in the commission of the relevant offence.": *per* Franki J in *Given* v. *Pryor* (1979) 24 ALR at p. 448.

[6] See para. 4.5, below.

[7] In the common law jurisdiction of Victoria a specific provision regarding incitement has been enacted in the Crimes (Conspiracy and Incitement) Act 1984. The provision now forms s. 321G of the Crimes Act of that state. It reads:

> Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by -
>
> (a) the person incited;
>
> (b) the inciter; or
>
> (c) both the inciter and the person incited -
>
> if the inciting is acted on in accordance with the inciter's intention, the inciter is guilty of the indictable offence of incitement.

It is unclear whether this provision requires that the incitee act at all in accordance with the wishes of the inciter, in which case the offence would seem to amount to little more than an offence of secondary liability, or whether, as with common law incitement, the crime is complete on the commission of the act of incitement.

The Code Jurisdictions; Queensland, Western Australia and Tasmania

2.1 As to the interpretation of the codes, the High Court of Australia has adopted the following guideline:

> ... [their] language should be construed according to its natural meaning, and without any presumption that it was intended to do no more than re-state the existing law. It is not the proper course to begin by finding how the law stood before the code, and then to see if the code will bear an interpretation which will leave the law unaltered.[8]

Nevertheless, where gaps or ambiguities are found in the code and unaided construction yields no clear and reasonable answer, guidance can be sought from the relevant principles of the common law.[9]

2.2 A statutory scheme of complicity liability is provided by sections 7-9 of the Queensland and Western Australian Criminal Codes (which are identical in terms), and sections 3-5 of the Tasmanian Code (which are similar, but not identical). The structure of these sections substantially reflects the common law approach to complicity. However, the Codes do depart in certain technical respects from traditional common law method. First, the separate rules and terminology that evolved for dealing with secondary participation in "felonies" and "misdemeanours" respectively, have disappeared under the Codes. Secondly, the definitional distinctions drawn between those accomplices present at, and those absent from, the scene of the crime have been abolished.[10]

2.3 Section 7 of the Queensland and Western Australian Codes provides:

> **Principal Offenders.** When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-
> (a) Every person who actually does the act or makes the omission which constitutes the offence;
> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> (c) Every person who aids another person in committing the offence;
> (d) Any person who counsels or procures any other person to commit the offence.[11]

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[8] *Brennan* (1936) 55 C.L.R. 253, at p. 263. In this case Dixon and Evatt JJ were considering the complicity provisions in ss. 7-8 of the Western Australian Code.

[9] *Stuart* (1974) 134 C.L.R. 426.

[10] Thus, a person may "aid" under these statutory provisions, though absent from the scene of the crime; or "counsel" while present at the scene of the crime. Common sense dictates which of the labels should be used in individual cases. See Gillies, *op. cit.*, pp. 29-31.

[11] This section corresponds substantially to s. 3(1) of the Tasmanian Code except that the term "abets" is used instead of "aids" in s. 3(1)(c) and "instigates" is used instead of "counsel or procures" in s. 3(1)(d). It was accepted in *Murray* (1962) Tas S R 170, at p. 182 that these differences are merely stylistic.

It seems that the Code was intended to restate the common law of complicity, hence its being cast in conventional common law terms.[12] Subject to the cautionary remarks of the High Court in *Brennan*,[13] and the clear authority that the common law rules as to the presence or absence of the secondary party at or from the scene of the principal offence have no application,[14] the courts have generally approached the concept of secondary liability under the Codes in a manner indistinguishable from that adopted at common law.[15] This is to be expected as the Codes do not fully define the actus reus of complicity and are silent on the issue of mens rea. These issues will be further examined in the discussion below of the common law states.[16]

2.4 Section 8 of the Queensland and Western Australian Codes[17] deal with cases of common purpose:[18]

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

The commission of the incidental offence must be a "probable consequence" of the common unlawful purpose and this probability must be assessed objectively.[19] This contrasts sharply with the notion of joint enterprise at common law where the accessory must be proven to

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[12] The Code does, however, in an isolated provision at s. 539, depart from the common law. It was probably the case that, at common law, an indictment would not have lain for an attempt to commit an offence as a secondary party. (The Criminal Attempts Act 1981, s. 1(4)(b) made this position a statutory certainty in England and Wales.) However, s. 539 (the corresponding Western Australian provision is s. 556) of the Queensland Code states:

> **Attempts to procure the commission of criminal acts**
> Any person who attempts to procure another to do any act or make any omission, whether in Queensland or elsewhere, of such a nature that, if the act was done or the omission was made, an offence would be committed, ... , whether by himself or by that other person, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself attempted to do the same act or make the same omission in Queensland.

[13] See n. 8 to para. 2.1, above.

[14] See n. 10 to para. 2.2, above.

[15] Gillies, *op. cit.*, at p. 29.

[16] See para. 3.1 *et seq.*, below.

[17] Section 4 of the Tasmanian Code.

[18] For an analysis of common purpose in the common law States, see para. 3.6, below.

[19] *Stuart* (1974) 134 C.L.R. 426, in which Gibbs J opined, at p. 442, "The question posed by [section 8] is whether in fact the nature of the [collateral (defined at n. 55, below)] offence was such that its commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence."

have had the commission of the collateral crime within his subjective contemplation or foresight.[20] Although this objective approach extends liability to include those incidental offences committed in the course of a common purpose that were an objectively probable consequence of that purpose, the scope of the original common purpose is assessed subjectively.

2.5 Section 9 of the Queensland and Western Australian Codes[21] declares a further form of complicity liability, unknown at common law. The provision applies to those accomplices who specifically "counsel another to commit an offence" under section 7(d) of the Queensland and Western Australian Codes,[22] and provides as follows:

> When a person counsels[23] another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the acts constituting the offence actually committed are a probable consequence of the carrying out of the counsel.
>
> In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

This section ascribes liability to those who counsel in cases where the crime committed by the principal was not within the subjective foresight of the "counsellor", but was an objectively probable consequence of acting on that original counsel. Section 9 is similar to section 8 in that liability under it is assessed on an objective basis. However, it differs from the latter in that it is not confined to those cases where the defendant is acting in concert with the perpetrator.

The Common Law Jurisdictions; New South Wales, Victoria and South Australia

3.1 Although the States of New South Wales, Victoria and South Australia have never adopted a comprehensive criminal code, each has a substantial criminal law statute.[24] The main function of these statutes is to enumerate offences, lay down procedure and prescribe maximum punishments; none effect a general exclusion of the common law, from which the principles of criminal responsibility are largely derived. Though at times there may be uncertainty whether a judicial innovation in one state or territory will be followed in another, the general development of the criminal law in each jurisdiction has been uniform. The

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[20] *Chan Wing-Siu* [1985] A.C. 168, *Hyde, Sussex & Collins*, [1991] 1 Q.B. 134.

[21] Section 5 of the Tasmanian Code.

[22] Section 3(1)(d) of the Tasmanian Code.

[23] In s. 5 of the Tasmanian Code, the word "instigates" is used at this point, although this difference is apparently without substantive significance. However, usage of the same word in the context of s. 3 of the Code has been construed as corresponding to "counsels or procures": see n. 11, above.

[24] The Crimes Act 1900 (N.S.W.), the Crimes Act 1958 (Vic.) and the Crimes Consolidation Act 1935 (S.A.).

present position regarding complicity is not dissimilar to the position in England before the changes introduced by the Criminal Law Act 1967. Unlike England and the code states, the substantive and procedural distinctions between felony and misdemeanour have been retained in the common law jurisdictions.[25] The retention of this distinction has several consequences: First, the original terminology classifying the different modes of participation in felonies continues to be used in these states. Parties to felonies are divided into principals in the first degree; principals in the second degree; accessories before the fact and accessories after the fact. Secondly, a separate body of procedural rules is operative when the courts are dealing with complicity in a felony, as opposed to complicity in a misdemeanour.

3.2 The procedural aspects of complicity have been modified to some extent in each of these states. As regards felonies, legislation has been adopted providing that an accessory before the fact may be indicted, tried, convicted and punished as if he were a principal felon.[26] It follows that since the accessory is to be regarded, for procedural purposes, as a principal there is no objection to someone, though indicted as a principal, being convicted as "an accessory before the fact" where the evidence discloses such participation. This was not possible at common law. The procedure for dealing with secondary parties to misdemeanours is provided for separately. The common law did not recognise distinct categories of participation in misdemeanours; all parties to a misdemeanour were treated as principals. This procedural assimilation overcomes several of the practical anomalies associated with complicity in felonies at common law that have been subsequently remedied by statute.[27] This common law rule that secondary parties to misdemeanours are to be treated for procedural purposes as principals has been restated in a statutory form in these States.[28]

3.3 The retention of the felony/misdemeanour distinction, while at variance with current English law, amounts to a mere difference in labelling rather than substance; the same rules exist as to what kinds of conduct can amount to secondary participation. The Australian courts have accumulated their own body of case law but the position appears to be identical to that in England on matters such as the effect of presence at a crime,[29] the fact that a causal link between the act of encouragement or assistance and the commission of the principal crime need not be shown,[30] and the sufficiency, to be rendered liable as an

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[25] The distinction between felony and misdemeanour was abolished in England by section 1 of the Criminal Law Act 1967.

[26] The Crimes Act 1900 (NSW), section 346; the Crimes Act 1958 (Vic), section 324; the Crimes Consolidation Act 1935 (SA), section 267(1).

[27] *Ibid.*

[28] The Crimes Act 1900 (N.S.W.), s. 351; the Crimes Act 1958 (Vic.), s. 333; the Crimes Consolidation Act 1935 (S.A.), s. 269. These sections are in a similar form to s. 8 of the Accessories and Abettors Act 1861. A secondary party to a misdemeanour may be charged as a principal or alternatively that he or she did "aid, abet, counsel or procure" the commission of the offence.

[29] See Consultation Paper, paragraph 2.25 above. See also Gillies, *op. cit.*, chapter 6.

[30] See Consultation Paper, paragraphs 2.15-2.22 above. See also Gillies, *op. cit.*, p. 53.

accessory, of inaction in a situation when the defendant is under a duty to act.[31] The last principle was, in *ex parte Parker*,[32] applied in the rather novel case of a person who failed to report to the police a crime about to be committed. The applicant had been informed by an acquaintance of the latter's intention to steal a number of razors from a warehouse where the applicant worked. The razors were not entered on the stock sheets and would therefore not be missed, were they to be stolen; a fact which was conveyed to the acquaintance by the applicant. On questioning by the police after the acquaintance had been found in possession of the razors, the applicant said that he knew he should have reported the matter to them, but was busy and had forgotten. Although it was accepted by the court that there is no general principle equating failure to report a crime with complicity, nor a rule that a party who remains inactive and fails to prevent a crime is liable as an accomplice, Owen J observed:

> ... I am by no means convinced that that rule is applicable when the person said to have aided and abetted was under a duty to his employer to prevent others from stealing the latter's goods. In such a case, I am of the opinion that, in some circumstances at least, a failure to carry out that duty or a statement that it would not be performed could amount to an encouragement or an acquiescence in the commission of an offence and thus constitute the person encouraging or acquiescing an aider and abettor.[33]

The duty referred to by His Lordship ought, in that case, to have been fulfilled by reporting the matter to the police. The judgment of Cussen ACJ in *Russell* was also alluded to:

> ... I am of the opinion (1) that if a person present at the commission of a crime in the opinion of the jury on sufficient evidence shows his assent[34] to such commission, he is guilty as a principal; and (2) that assent may in some cases be properly found by the jury to be shown by the absence of dissent, or in the absence of what may be called an effective dissent.[35]

The acquiescence of the duty-owing employee in the face of the crime of his acquaintance was enough to render him liable as an accomplice. While the case may seem to ascribe liability in a rather extreme manner, the court was expressing the acquiescence of the applicant in terms of its actual encouragement of the principal offender. The information passed on to the acquaintance concerning the stock sheets and the urge from the applicant to the acquaintance to "be careful whatever he did" may simply go to show that the case is an

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[31] See Consultation Paper, paragraphs 2.26-2.30 above. See also Gillies, *op. cit.*, chapter 6.

[32] [1957] SR (NSW) 326; 74 WN 463.

[33] (1957) 74 WN (NSW) 463, at p. 465.

[34] "Assent" has somewhat more passive connotations than words used more recently to describe an act of encouragement; but it is clear from the judgment that Cussen ACJ was using the word on the basis that it was a legitimate synonym for encouragement. At (1933) VLR 66-67, a list of such synonyms to be found in the relevant authorities is related. It contains the following terms: comforting, concurring, approbating, encouraging, consenting, assenting, countenancing.

[35] *Ibid.*, citing (1933) VLR 59, at p. 66.

ordinary instance of encouragement, rather than a radical extension of the "control" principle.[36]

3.4 As to the mens rea of complicity, the main authority is the decision of the High Court of Australia in *Giorgianni* v. *R.*[37] The case arose from an incident in which a truck with defective brakes, owned by the applicant, was driven by his employee and ran out of control; five people were killed in the ensuing accident. The applicant was charged as a secondary party[38] to an offence under section 52A of the Crimes Act 1900 (NSW) of culpable driving occasioning death or grievous bodily harm. The trial judge indicated that a negligent failure to be aware of the unsafe condition of the truck was a sufficient mental element and the defendant was convicted. The High Court overturned his conviction, although their Lordships' respective analyses of the necessary mens rea for complicity liability show the difficulty of expounding a consistent account of the relevant common law. Gibbs CJ tended to the view that a secondary party must have, as the purpose of his acts of assistance or encouragement, the commission of the principal offence. He drew on Judge Learned Hand in *US* v. *Peoni*,[39] who observed, when referring to various definitions of an accessory:

> ... they all demand that he in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colourless 'abet' - carry an implication of purposive attitude towards it.[40]

However, Gibbs CJ was the only member of the court to address the issue of purpose in a direct, clear manner. In a joint judgment with Deane and Dawson JJ, Wilson J was of the opinion that:

> Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence.[41]

The ambiguity of the phrase "intentional assistance or encouragement" can lead to interpretational difficulties. It is unclear whether, to satisfy such a mental requirement, an

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[36] I.e. the principle whereby those present at the commission of a crime who remain inactive, may be liable as accomplices if they are under a duty to act. In *ex parte Parker*, the applicant was in fact absent from the scene of the crime when it was actually committed.

[37] (1985) 156 C.L.R. 473.

[38] The Crimes Act, s. 351 provides for the prosecution of secondary parties to misdemeanours, in similar terms to the (England and Wales) Accessories and Abettors Act 1861, s. 8.

[39] (1938) 100 F 2d 401, at p. 402.

[40] See Appendix Part 4, para. 2.6 below. His Lordship also referred to the judgment of Cussen ACJ in *Russell* [1933] VLR 59, at p. 67: "... [the accessory must be] linked in purpose with the person actually committing the crime ...".

[41] (1985) 156 CLR 473, at p. 505.

action must be performed *with a view to* assisting or encouraging the principal offender or whether an act performed intentionally, which *happens to* assist or encourage him will suffice.[42]

3.5 A fundamental aspect of the law of complicity is that, to be liable as an accomplice, an accused must have knowledge of the "essential matters" that constitute the offence.[43] "Essential matters" is a consistent theme throughout *Giorgianni*;[44] all the members of the court felt that knowledge of such matters was a prerequisite to accomplice liability. As Wilson J observed:[45]

> It is not sufficient if [the accessory's] knowledge or belief extends only to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realises it or not, as to constitute the factual ingredients of a crime. If that were sufficient, a person might be guilty of aiding, abetting, counselling, or procuring the commission of an offence which formed no part of his design.

Professor Fisse has taken this approach to signify the following:

> If knowledge in the sense of actual knowledge or accurate resolute belief [as to the essential matters of the offence] is required, it follows that there is no liability for complicity where D renders aid or encouragement in advance of the commission of the principal offence and, at all times of D's involvement, the principal offence has remained no more than a likelihood or strong possibility.[46]

This criticism of what is perceived as a restrictive effect of *Giorgianni* on liability for complicity merely serves to highlight the ineptitude, in certain situations, of using a word such as "knowledge" when describing the attitude of an accomplice to the behaviour of the principal offender.[47] Wilson J, in the second sentence of the judgment extract above, and

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[42] Similarly equivocal is His Lordship's observation at p. 506 that, "... offences [of aiding, abetting etc.] require intentional participation in a crime by lending assistance or encouragement." See Main Paper paragraphs 2.47ff.

[43] *Johnson* v. *Youden* [1950] 1 KB 544, at p. 546, *per* Lord Goddard CJ. See Main Paper paragraph 2.56.

[44] See e.g., Gibbs CJ, at p. 481; Mason J, at p. 494 ; Wilson J *et al.*, at p. 500 .

[45] At pp. 506-7.

[46] *Op. cit.*, at p. 332.

[47] This ineptitude has developed primarily as a result of the original formation of coherent principles of complicity in instances of assistance or encouragement by one who, prior to the Criminal Law Act 1967, would have been known as a principal in the second degree (i.e. an accessory present at the scene of the principal offence). In certain circumstances, it would be entirely appropriate to talk of the accessory's "knowledge" of the essential matters as they would be taking place in front of him. (See e.g., *Du Cros* v. *Lambourne* [1907] 1 KB 40, in which the defendant was proved to have been in his car with another party while it was being driven at a dangerous speed. The defendant must have *known* the car was being driven at that particular speed.) To assess the mental state of one who, pre-1967, would have been categorised as an accessory before the fact (i.e. a party who rendered assistance or encouragement at a time prior to the commission of the principal offence)

Professor Fisse, seem to incline to the view that the requirement of knowledge of essential matters would preclude accomplice liability in situations other than where that accomplice was present at the scene of the crime or, in the case of Wilson J, where an accessory before the fact knew the *precise* nature of the offence to be committed by the principal offender. However, other jurisdictions, notably England, where knowledge of the essential matters constituting the principal offence is a prerequisite to accessorial liability, have developed a body of jurisprudence according to which a party may be liable as an accomplice if he knows either the type of offence to be committed or knows that it is one of a list of offences within his contemplation.[48] Cases show that the English courts have had little difficulty in viewing the notion of knowledge of essential matters as a means to the end of achieving the possibility of a conviction in situations where social and moral considerations appear to demand such, rather than as a dogmatic constraint.[49] Professor Fisse's arguments above seem to imply that such a process would be an impossibility in Australia. This is surely not the case. However, the Australian courts have yet to deal directly with the issues arising from *Bainbridge* and *Maxwell*. At least one case hints at a judicial preference for relying on matters of pure knowledge; in *Stokes & Difford*,[50] a decision of the New South Wales Court of Criminal Appeal, the question arose as to whether knowledge of the principal offender's intentions would satisfy the "knowledge of essential matters" test. Hunt J answered in the affirmative, observing:

> In relation to both types of accessories [accessories participating both before and during the commission of the principal offence], it seems to me, it is usually more appropriate to speak of the accessory's knowledge (or awareness) of the principal offender's *intention* to do an act with a particular state of mind at the time when the accessory aids, abets, counsels or procures the principal offender to commit the crime in question than it is to speak of the accessory's knowledge of the act *done* by the principal with that state of mind.

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in terms of "knowledge" is unhelpful and misleading, as absolute knowledge of the future actions of the principal offender is simply impossible. At best, the accessory can foster a *belief* as to those actions.

[48] *Bainbridge* [1960] 1 QB 129; *DPP* v. *Maxwell* [1978] 1 WLR 1350. Curiously, Wilson J states, at (1985) 156 CLR, p. 506, "The questions which [*Bainbridge* and *Maxwell*] raise do not arise in this case and it is unnecessary to do more than refer to them." With respect, the issues of these two cases seem particularly pertinent in a discussion of this nature. The two cases do show that a party can be an accomplice to an offence that is not strictly part of his *design*. In effect, they qualify the strict requirement of knowledge of essential matters by providing for the possibility of a conviction in a situation where the defendant had knowledge of (or, as has been argued a better term in n. 47, above, *belief in*) the future occurrence of any one of a group of certain sets of facts.

[49] See n. 48, above.

[50] (1990) 51 A Crim R 25.

With respect, this assessment also[51] fails to address the issue that, in England at least,[52] the "knowledge of essential matters" test has become a far more flexible concept and more pragmatic basis for analysis than could be accommodated by strict semantic theory.[53]

Common Purpose in the Common Law States

3.6 As has been stated above,[54] those States with criminal Codes have adopted a method whereby the liability of a party in a joint enterprise for a "collateral" crime[55] perpetrated by the other party to the venture is assessed in terms of the objective probability of that collateral crime taking place. The common law position has been clarified by the decision of the High Court of Australia in *Johns* v. *R.*[56] In that case the defendant drove himself and a partner to a rendezvous near the scene of an intended robbery, knowing that the latter was armed with a pistol and prone to violence. It was also expected that the intended victim of the robbery would be armed and given to determined resistance. The robbery attempt failed and the partner shot the victim dead. The defendant was convicted as an accomplice[57] to murder and appealed on the ground that the jury had not been directed that participants in a common design are only responsible for the probable as distinct from the possible consequences of that design. However, the appeal was rejected; it was held that an offence was in the scope of the common purpose, and therefore rendered the defendant liable, if it was either within the contemplation of the defendant and his partner, and foreseen as a possible[58] incident of their planned enterprise, or was authorised by the defendant as an action which the partner might take in the event of such behaviour proving necessary or expedient.[59]

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[51] See also Fisse, *op. cit.* in para. 3.5, and in Howard's Criminal Law, *op. cit.*, p. 332.

[52] Since *Bainbridge* [1960] 1 QB 129 and *DPP* v. *Maxwell* [1978] 1 WLR 1350.

[53] In discussions of mens rea requirements for complicity, much confusion is generated by the use of words such as "knowledge", "recklessness" and even "intent". Wilson J in *Giorgianni* (1985) 156 CLR 473, at p. 507, in attempting to define the necessary mens rea for an accomplice, states that such a party must have "... an intent which must be based upon knowledge or belief of the necessary facts." It is unclear whether this refers to an actual intention that the offence be committed, or to what is generally referred to as an "oblique" intention, i.e., an inferred intention based on the foresight of the defendant. This confusion is symptomatic of the inadequacy of traditional legal labels when describing the attitude of one party to the commission of acts by *another*. We believe that definitions based on a concept such as "belief", which can truly and meaningfully reflect the state of mind of an accomplice, ought to be preferred: see Main Paper, paragraphs 4.82ff.

[54] See para. 2.4 *et seq.*, above.

[55] I.e., a crime not explicitly the subject of the original common design.

[56] (1980) 143 CLR 108.

[57] In Australia, common purpose does not represent a supplanting of the general principles of complicity. See Gillies, *op. cit.*, p. 91-92.

[58] "Possibility" equates to a substantial risk, rather than a slender chance: *Johns*, *op. cit.*, at p. 119 *per* Stephen J.

[59] See also *Kyriakou* (1987) 29 A Crim R 50.

Reform Proposals

Commonwealth Law

4.1 The Commonwealth Criminal Law Review Committee has published a Discussion Paper dealing with, amongst other things, Commonwealth rules governing secondary liability and incitement in Australia.[60]

4.2 The paper reviews the relevant provisions as to secondary liability, namely section 5 of the Crimes Act 1914 (Commonwealth).[61] The Review Committee opined:

> ... the law [concerning secondary participation] is in a constant state of development and it would be undesirable to prevent its further development by seeking to put all its complexities in a statutory form.[62]

4.3 The desire to allow the law continual, unhindered evolution led the Committee to advance the option of leaving section 5 as it stood, with the exception of reexpressing the phrase "aiding, abetting, counselling, or procuring" in more modern terms of assistance or encouragement.[63]

4.4 The proposals advanced in paragraphs 4.2-4.3 above were preferred above the option of total codification of the law concerning parties to offences. The conclusions of the Committee will be considered below in the context of the report published in relation to consultation on these issues.

4.5 Regarding incitement, the Committee said of section 7A of the Crimes Act 1914:[64]

> ... it is little different from the common law but in so far as it also makes it an offence:
>
> > to aid the commission of an offence;
> >
> > to print or publish any writing which incites to, urges, aids or encourages the commission of an offence,
>
> it goes significantly further than the common law.[65]

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[60] Review of Commonwealth Criminal Law, Discussion Paper No. 10, *Secondary Offences and Offences by Corporations* (1988).

[61] See para. 1.2, above.

[62] Paragraph 3.16.

[63] Paragraph 3.17. The Committee also considered cls. 29-33 of the Code Team Report, but suggested that their length and complexity made them inappropriate for adoption in statutory form in Australia.

[64] See para. 1.3, above.

[65] Discussion Paper No. 10, paragraph 4.6.

However, the committee was not certain that section 7A created an inchoate offence of aiding. In its opinion:

> ... it is at least arguable that, if the expression ["aids"] has the same meaning as in section 5, the same rule as to [the] requirement of [the] commission of the principal offence applies in relation to the expression in section 7.[66]

4.6 The Committee recommended that a defence of impossibility ought not to be available in cases in incitement, favouring the policy adopted by the Law Commission in its report *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*.[67]

4.7 The themes of the Discussion Paper have been further developed, following consultation, to the Report stage.[68] Part III of the Report is entitled "SECONDARY OFFENCES".

4.8 The Review Committee recommended that section 5 of the Crimes Act be replaced by a provision to the effect that

> a person who is knowingly involved in the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of the Act, should be deemed to have committed that offence and should be punished accordingly[.][69]

The phrase "knowingly involved" was proposed as a replacement for "knowingly concerned", which appears in section 5 of the Crimes Act. It was felt that the traditional terms of art should be replaced by more modern language.[70] The term "knowingly involved" would be defined to include a person who assisted, encouraged or procured the commission of an offence.[71] The Report envisages that a person may be charged either with being a person

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[66] Paragraph 4.10.

[67] Law Com. No. 102 (1980). At the time of that report, the law allowed for a conviction for incitement, notwithstanding the existence of facts which would render impossible the commission of the offence incited: *McDonough* (1962) 47 Cr App R 37. However, the Court of Appeal in *Fitzmaurice* [1983] QB 1083 took the opposite view. In Australia, the Review Committee recognised that *Fitzmaurice* produced an anomalous situation whereby impossibility is a defence in cases of incitement, yet not in cases of statutory conspiracy or attempt (Criminal Law Act 1977 s. 1(1); Criminal Attempts Act 1981 s. 1(2)). It was recommended that the Crimes Act expressly provide that impossibility would not be available as a defence to a charge of incitement.

[68] Review of the Commonwealth Criminal Law: *Interim Report on the Principles of Criminal Responsibility and Other Matters* (1990).

[69] Paragraph 16.70(a).

[70] Paragraph 16.53.

[71] Paragraph 16.70(b).

knowingly involved in the offence in those words or by alleging that he or she procured, assisted and encouraged the offence or did one or more of those acts.[72]

4.9 The Committee rejected the need for the comprehensive codification of common law principles relating to complicity, as

> ... the ... law is in a constant state of development by judicial decision and there does not seem to be the same pressure that there is in some other areas ... for a statutory re-statement of the law.[73]

4.10 However, four existing common law rules were of such importance that to remove any doubt as to their applicability and terms, they should be incorporated (in a modified form where appropriate) into a codified scheme. The proposals related to:

(i) *Innocent Agency*: The Committee considered proposals from the Law Commission[74] and the relevant provisions of the New Zealand Crimes Bill.[75] The Committee considered that the two provisions dealt inadequately with the instance where the perpetrator of an offence escaped criminal liability on account of his having a defence. Difficulties could arise as to which defences available to a perpetrator ought to be applicable also to the person bringing about the offence. Where a defence relates solely to the personal characteristics of the perpetrator, such as automatism, clearly the liability of the party bringing about the offence should not be affected. However, in instances of a defence relating to external circumstances, such as self-defence, it is not at all clear that such a principle ought to apply. It is certainly arguable that, as the Committee observes:

> ... a person procuring another to act in self-defence should have an equivalent defence.[76]

The approach of the Queensland Criminal Code, where this dilemma does not arise, was preferred. The last paragraph of section 7 provides:

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[72] Paragraph 16.70(f).

[73] Paragraph 16.18.

[74] Draft Code, clause 26(1)(c).

[75] Clause 56 of that Bill states:

Person who commits offence through innocent agent -

(1) Every person is a party to an offence who intentionally causes an innocent agent to commit the act that constitutes the offence.

(2) In **subsection (1)** of this section, the term "innocent agent" means a person who at law cannot be held criminally responsible for the offence.

[76] Paragraph 16.21.

> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

The adoption of a provision along these lines would mean that whenever "there was a defence in relation to the act not arising from the characteristics of the person procured, that defence could be pleaded by the procurer".[77] The Committee also considered that a provision of similar effect to sub-clause 26(3) of the Draft Code[78] ought to be combined with the Queensland extract above.

(ii) *Common Purpose*: The Committee inclined against the objective approach exemplified by section 8 of the Queensland Criminal Code,[79] by which a person is liable for the commission of an offence incidental to an unlawful common enterprise if the offence is a "probable consequence" of the prosecution of that enterprise. Instead, the common law position, by which a party to a joint enterprise must be proved to have had the commission of the incidental offence in his subjectively assessed contemplation, was preferred.[80] The Committee was aware, however, that expression of the common law rule in statutory form would not be easy given the wide variety of tests for the likelihood of the occurrence of the collateral offence suggested by the Privy Council in *Chan Wing-Siu*.[81] The Committee were of the opinion that despite this problem, the common law in this field was of sufficient significance to warrant statutory restatement.[82]

(iii) *A rule akin to the rule in* Bainbridge: The Committee was of the opinion that a provision similar to section 9 of the Queensland Code[83] was desirable, to the effect that it would be immaterial that the way in which the principal offence was committed was different from that counselled, so long as it was an objectively probable consequence of that

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[77] Paragraph 16.27.

[78] Sub-clause 26(3) provides:

> [the innocent agency provision] applies notwithstanding that the definition of the offence -
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> (a) implies that the specified act or acts must be done by the offender personally; or
>
> (b) indicates that the offender must comply with a description which applies only to the other person referred to in [the innocent agency provision].

[79] See para. 2.4, above.

[80] See Main Paper, paragraphs 2.108ff.

[81] "Various formulae have been suggested - including a substantial risk, a real risk, a risk that something might well happen. No one formula is exclusively preferable; indeed it may be advantageous in a summing-up to use more than one": [1985] AC 168, at p. 179, cited by the Committee at paragraph 16.35.

[82] Paragraph 16.36.

[83] See para. 2.5, above.

counselling. However, an objectivist approach such as this, as the Committee recognised, would represent a significant extension of the common law.[84] A more appropriate course was thought to be a provision based on sub-clause 27(4) of the Draft Code.[85]

(iv) *A rule to the effect that a person may be liable as a secondary party although the principal is not convicted*: Such a rule was considered by the Committee to be of practical significance, and it was concluded that a provision based on paragraph 28(2)(a) of the Draft Code[86] ought to be included in the project of codification.[87]

4.11 The Committee felt that, once these changes had been made, it would be necessary to conduct a review of all other statutes containing traditional language of aiding and abetting in order to determine whether such provisions needed to be retained, or whether reliance could instead be placed on the general provisions of the proposed new law.[88]

4.12 The Report also considers incitement, and the responses to consultation on the original Discussion Paper. The relevant conclusions of the Committee are summarised below.

4.13 While the Committee recommended the retention of a separate offence of incitement,[89] it recommended that the word "aids" in section 7A of the Crimes Act be removed.[90]

4.14 As had been proposed in the Discussion Paper,[91] it was recommended that the defence of impossibility ought not to be available in cases of incitement.[92]

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[84] Paragraph 16.41.

[85] Paragraph 16.43. These provisions would effectively put into statutory form the rule in *Bainbridge*, whereby the accomplice need not know all the precise details of the principal offence, such as the exact time and place of commission. The Committee considered that the general requirements as to the mental element for complicity, as illustrated in *Giorgianni* (see paras. 3.4-3.5, above) ought to be left to the courts for development.

[86] Paragraph 28(2)(a) reads:

> A person may be convicted of an offence as an accessory although -
>
> (a) the principal has not been convicted of or charged with the offence or his identity is unknown.

[87] Paragraph 16.49.

[88] Paragraph 16.70(g).

[89] Paragraph 18.53(a).

[90] The Committee could not be sure that the word "aids" created an inchoate offence of aiding (paragraph 18.21). See paras. 1.3 and 4.5, above. The conclusion appears to be that the word adds nothing to the section. (See also paragraph 18.9.)

[91] See para. 4.6, above.

[92] Paragraph 18.53(e).

4.15 The Committee concluded that it should be made clear that it is an offence to incite a person to assist, encourage or procure the commission of an offence.[93]

4.16 However, the Committee concluded that an offence of incitement to attempt ought not to be provided for,[94] since in most cases, such a charge would be inept,[95] the offence usually incited being the complete, rather than attempted version.[96]

4.17 In a similar vein, the Committee does not recommend provision for offences of incitement to incite, nor incitement to conspire.[97]

4.18 In December 1992, the Criminal Law Officers Committee (CLOC) of the Standing Committee of Attorneys-General published a Final Report, containing a Model Criminal Code for Australia, following the recognition by the latter that continued inconsistency in criminal law throughout Australia could no longer be justified.[98]

4.19 Complicity is considered at section 402,[99] which reads:

> A person who aids, abets, counsels or procures the commission of an offence may be dealt with and punished as a principal offender.

The Code retains the traditional language of aiding, abetting, counselling and procuring, preferring it to the "knowingly involved" proposal produced by the Commonwealth Criminal

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[93] Paragraph 18.53(f). By contrast, the current position in English law is, *pace*, with respect, Professor Williams in his *Textbook of Criminal Law* (2nd ed., 1983), at p. 443, that it is not an offence to incite a person to aid, abet, counsel, or procure the commission of an offence: *Bodin* [1979] Crim LR 176. See Main Paper, para. 2.124 above.

[94] Paragraph 18.53(g).

[95] Paragraphs 18.45-18.46.

[96] One unlikely exception being the situation where, in circumstances known to the inciter but not the incitee, the completed act incited will amount only to an attempt. (The Law Commission recognised this exception in paragraph 13.16 of the commentary to the Draft Code.) See Main Paper, paragraph 2.141 above.

[97] Paragraph 18.53(g).. See Main Paper, paragraphs 2.138ff.

[98] See Criminal Law Officers' Committee of the Standing Committee of Attorneys-General (CLOC), *Model Criminal Code*: Chapter 2, General Principles of Criminal Responsibility, Preface, at p. i. The Final Report had been preceded, in July 1992, by a Discussion Draft of the Code.

[99] CLOC, *op. cit.*, at p. 86.

Law Review Committee,[100] which, it was considered by the CLOC, would add little in substance and would be more open-ended than the traditional formula.[101]

4.20 As to the fault requirements for complicity, section 402.1[102] states:

> A person may only be found guilty of aiding, abetting, counselling or procuring the commission by another person of an offence if his or her conduct did in fact aid, abet, counsel or procure the commission by that other person of that offence, and the first mentioned person
>
> **Complicity**
>
> intended that his or her conduct would aid, abet, counsel or procure the commission of any offence of the type committed by the other person; or
>
> **Common Purpose**
>
> intended that his or her conduct would aid, abet, counsel or procure the commission of an offence and was reckless about the commission of the offence (including its fault elements) in fact committed by the other person.

4.21 In the Discussion Draft, the CLOC adopted recklessness based on the taking of a substantial and unjustified risk[103] as an adequate mental element for complicity.[104] As to

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100 See paras. 4.1ff above.

101 CLOC, *op. cit.*, at p. 87.

102 *Ibid.*, at p. 86. The corresponding section in the Discussion Draft read:

> A person may only be found guilty of aiding, abetting, counselling or procuring the commission of an offence if the person
>
> knows of, or is reckless about, the commission of an offence (including its fault elements) of the type to be committed by the principal offender; and
>
> intends that, or is reckless as to whether, his or her conduct will aid, abet, counsel or procure the commission of an offence of the type to be committed by the principal offender.

The CLOC decided, at p. 79 of the Discussion Draft, to adopt the approach of Professor Fisse, (*Howard's Criminal Law*, (5th ed, 1990), at pp. 330-333, and at pp. 342-343, where he states, "The central issue is...whether D intentionally or recklessly promoted the principal offence actually committed by [the principal]") as opposed to the that of the American Law Institute in the Model Penal Code, (section 2.06(3), which requires proof of the defendant's "purpose of promoting" the commission of the principal offence: see this Appendix Part 4 paras. 2.5ff) favouring a formulation that encompassed recklessness as part of the mental element.

103 See CLOC, *op. cit.*, s. 203.3:

> A person is reckless with respect to a circumstance when he or she is aware of a substantial risk that it exists or will exist and it is, having regard to the circumstances as known to him or her, unjustifiable to take the risk. A person is reckless with respect to a result when he or she is aware of a substantial risk

the doctrine of common purpose, it was noted[105] that conviction of the defendant followed where the collateral offence was within the contemplation of the defendant and principal offender as a *possible* incident of their planned enterprise. It was considered both unjust and confusing to juries if the doctrine could be used to convict an accomplice; it would be anomalous if liability for recklessness was imposed on the basis of contemplation of a possibility in instances of complicity with regard to collateral offences, but not for other offences, nor, indeed, for the planned offence. Consequently, abolition of the common purpose rule was recommended.[106]

4.22 In the Final Report, recklessness was deleted as a possible mental element for complicity.[107] It was considered that purposiveness was the essence of complicity and that it would be an undesirable extension of liability to allow for conviction on the basis of recklessness.[108] It was decided, in the light of this move, to restore the common purpose doctrine in a modified form, based on the general test of recklessness used in the Code,[109] namely, foresight of a substantial and unjustified risk that another offence beyond the one agreed would be committed.

4.23 Section 402.2 of the Code[110] reads as follows:

> A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, he or she
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> terminated his or her involvement; and
>
> took all reasonable steps[111] to prevent the commission of the offence.

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that it will occur and it is, having regard to the circumstances as known to him or her, unjustifiable to take the risk.

104 See n. 102, above.

105 CLOC, Discussion Draft, at p. 79.

106 *Ibid.*, at pp. 79-81.

107 See para. 4.20, above.

108 CLOC, *op. cit.*, at pp. 89 and 77.

109 Section 203.3. See n. 103, above.

110 CLOC, *op. cit.*, at p. 86.

111 The Discussion Draft required only that D "[make] a reasonable effort" to prevent the commission of the offence. The formulation was changed in response to submissions.

The models for this particular provision[112] are Section 2.06(6)(c) of the Model Penal Code[113] and section 8(2) of the Western Australian Code. Examples of a reasonable effort to prevent the commission of the offence are informing the principal offender of the termination of his or her participation, and giving a timely warning to an appropriate law enforcement authority.[114]

4.24 Section 402.3,[115] to which there is no accompanying commentary, restates the established principle that an accomplice may be convicted, regardless of whether or not a principal offender has been prosecuted or found guilty:

> A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even though the principal offender has not been prosecuted or found guilty provided that the commission of the principal offence is proved.

4.25 Section 404[116] deals with incitement:

> A person who urges[117] the commission of an offence is guilty of the offence of incitement.

4.26 The CLOC proposal does not require that the incitement be acted upon.[118]

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[112] See CLOC, *op. cit.*, at p. 91. The existence of a similar defence at common law is also recognised, *ibid:* see eg, *Beccera* (1975) 62 Cr App R 212.

[113] See Appendix Part 4, para. 2.12 below.

[114] CLOC, *op. cit.*, at p. 81.

[115] *Ibid.*, at p. 86.

[116] *Ibid.*, at p. 92.

[117] In the Discussion Draft, the CLOC followed the proposal of the Commonwealth Criminal Law Review Committee (see para. 4.13 above), merely specifying "incitement" rather than spelling out the common law of "counsels, commands or advises": G Williams, *Criminal Law: The General Part* (1961), at p. 252. As is observed at p. 93 of the Final Report, there are a number of verbs employed in this area of law: the US Model Penal Code, at S. 5.02(1), uses "encourages or requests" (see Appendix, Part 4, para 4.1); the Commonwealth Crimes Act s. 7A, uses "incites to, urges, aids or encourages" (see para. 1.3 above); the Draft Code s. 47(1) and the Victorian Crimes Act s. 321G(1) use "incite" only; the Canadian Draft Code (see Appendix, Part 2, para. 4.9 above) collapses complicity and incitement, using the phrase "advises, encourages, urges, incites". Following the Report undertaken by M Murray QC, Western Australian Crown Counsel, *The Criminal Code: A General Review* (1983), at p. 584, the Western Australian Code, at s. 553, now contains an offence of incitement, consistent with the wording of s. 404 of the CLOC Code except in relation to the applicable fault element, as to which, see para. 4.27 below. The CLOC was concerned that some courts have interpreted "incites" as merely requiring that D causes rather than advocates the offence. It was decided that the verb "urges" would avoid this ambiguity, while capturing the essence of the offence.

[118] *Op. cit.*, at p. 95. Contrast s. 321G of the Victorian Crimes Act.

4.27 The fault element for the offence is set out in section 404.1:[119]

> For a person to be guilty of incitement, the person must intend[120] that the offence incited be committed.

4.28 The CLOC examined the issue of a possible defence of abandonment, but concluded that, as incitement differed from complicity in that liability was established before, and indeed irrespective of, the commission of the principal offence, the provision of such a defence would be inappropriate.[121]

4.29 As to situations in which the commission of the offence incited is impossible, the CLOC Code provides, at section 404.2:[122]

> A person may be found guilty of incitement even though commission of the offence incited was impossible.

4.30 Section 404.3[123] provides:

> Any defences,[124] procedures,[125] limitations or qualifying provisions that are applicable to an offence apply also to the offence of inciting the commission of that offence.

4.31 Section 404.4[126] deals with limitations on the applicability of the incitement provisions:

> This section does not apply to an offence under section 401 (attempt), 405 (conspiracy) or this section [incitement].

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119 CLOC, *op. cit.*, at p. 92.

120 The Discussion Draft would have allowed for conviction on the basis of recklessness. However, in a policy decision similar to that made in relation to the mental element for complicity (as to which, see para. 4.20, above), recklessness was deleted from the Final Draft. In addition, the CLOC was concerned that recklessness in incitement was too great a threat to freedom of speech: see CLOC, *op. cit.*, at p. 95.

121 *Ibid.*

122 CLOC, *op. cit.*, at p. 92.

123 *Ibid.*

124 Although this section is, we presume, designed to deal with, say, the situation in which X and Y are both being attacked by Z, and X incites Y to strike Z in defence of them both, the language employed by the CLOC can lead to rather curious conclusions: can A, an adult, who incites B, an infant, to steal from C, rely on B's defence of infancy?

125 Eg, incitement of a summary offence would be triable summarily, while incitement of an offence triable on indictment would itself be triable on indictment.

126 CLOC, *op. cit.*, at p. 92.

The CLOC, wishing in some way to limit the ambit of preliminary offences, decided that it should not be possible to be guilty of inciting to incite, conspire, or attempt.

4.32 There is no bar, however, to a charge of attempting to incite.[127] This is primarily to deal with situations in which a communication, amounting to an incitement does not, for some reason, reach its intended recipient.[128]

State Law

4.33 Unfortunately, the law of complicity and related issues has not been considered in great detail by the various law reform agencies operating on a state level in Australia. It appears that the subject has, up to now, only been analysed by the South Australian Criminal Law and Penal Methods Reform Committee (SACLRC),[129] and even then only in the context of a broad review of the criminal law as a whole.

4.34 The SACLRC recommended a redefinition of the doctrine of common purpose in terms of recklessness, such that an accomplice is liable for an offence committed by the principal offender if there is a substantial risk that the offence will be committed.[130]

4.35 It was further recommended that one who lends things to another, or who, in the course of his normal business, renders assistance or supplies materials reckless as to the commission of an offence should be guilty of complicity in that offence.[131]

4.36 As to innocent agency, the SACLRC concluded that, in a similar manner as under sub-clause 26(3) of the Draft Code,[132] a person acting through such an agent ought to be liable to conviction notwithstanding that the definition of the offence in question either specifies or implies that it can be committed only by a person of a particular description, which does not fit the defendant, but does fit the innocent agent, or uses language in the definition of the offence which implies that it should personally be committed by the defendant.[133]

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127 CLOC, *op. cit.*, at p. 95. Such a charge exists at common law: see *Crichton* [1915] SALR 1; *Chelmsford JJ, ex parte Amos* [1973] Crim LR 437.

128 *Ibid.* This is consistent with S. 5.01(3) of the US Model Penal Code and the Report, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, Law Com. No. 102, (1980), at paragraph 2.121.

129 SACLRC 4, *The substantive criminal law* (1977). We are aware, however, that most State and Territorial jurisdictions are currently undertaking, or about to undertake major reviews of their respective Criminal Codes or Crimes Acts: see CLOC, *op. cit.*, Preface, at p. i.

130 The Law Reform Commission of Australia, *The Law Reform Digest* (1983), chapter 45.10, paragraph 254.

131 *Ibid.*, paragraphs 255-256.

132 See n. 78 above.

133 Law Reform Commission of Australia, *op. cit.*, paragraph 257.

4.37 The so-called rule in *Tyrrell*[134] was considered; the SACLRC concluded that it should operate in respect of the victim of a sex offence under the age of consent, but should not extend to any other situation of the victim of an offence being a willing party to its commission.[135]

4.38 Finally on the subject of complicity, the Committee recommended that the defence of withdrawal from a criminal enterprise should not be an answer to the charge as a matter of law, but should be treated as evidence going to the question whether the defendant ever became an accomplice, and whether the offence with which he is charged went beyond the original agreement.[136]

4.39 The recommendations of the SACLRC on incitement are brief and uncontroversial. The retention of an offence of incitement is considered desirable,[137] and offences of attempted incitement[138] and conspiracy to incite[139] are proposed.[140]

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134 See Main Paper paragraphs 2.83-2.88.

135 Law Reform Commission of Australia, *op. cit.*, paragraph 258.

136 *Ibid.*, paragraph 259.

137 *Ibid.*, paragraph 268.

138 The existence of such an offence in English law was recognised in *Chelmsford JJ, ex parte Amos* [1973] Crim LR 437.

139 In English law, such an offence is presumably covered by s. 1(1) of the Criminal Law Act 1977.

140 Law Reform Commission of Australia, *op. cit.*, paragraph 269.

APPENDIX

PART II: CANADA

Introduction

1.1 The first Canadian Criminal Code was enacted in 1893. Since then, the Code has undergone little fundamental revision, although consolidations of the Code were performed in 1906, 1927, and, most significantly,[1] 1955.[2] By the 1955 consolidation, common law offences were abolished.[3] The Code is however, not exhaustive; a large number of statutes[4] create offences substantially indistinguishable from Code offences. There are further provincial statutes regulating such matters as highway traffic, liquor security trading, public health and occupational safety.

Parties to offences

2.1 Section 21(1) of the Code provides as follows:

> Every one is party to an offence who
> (a) actually commits it,
> (b) does or omits[5] to do anything for the purpose[6] of aiding any person to commit it, or

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[1] See D. Stuart, *Canadian Criminal Law*, (2nd ed., 1987), p. 3.

[2] The most recent update was in 1970 (RSC 1970 c-34).

[3] S. 8. However, by what is now s. 7(3), recourse may be had to those common law principles governing matters of justification or excuse for an act, or a defence to a charge.

[4] Eg, the Customs Act; the Food and Drugs Act; the Income Tax Act; the Competition Act and the Narcotic Control Act (all 1970).

[5] That there is no express reference to omission in subsection (c) has not been deemed significant by the courts (Stuart, *op. cit.*, p. 504). This seems to reflect the conception of aiding and abetting as a composite notion, rather than as two distinct modes of behaviour. As to aiding and abetting by omission, the law appears to be similar to that in England (as to which, see Consultation Paper paras. 2.23-2.30 above). Dickson J observed in *Dunlop* (1979) 47 CCC (2d) 93 (SCC) (a case involving the gang-rape of a sixteen-year-old girl by about eighteen members of a motorcycle club, the main question concerning the potential liability of members of the club who merely stood around while the rape was taking place), at p. 110:

> "Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement."

[6] This express requirement of purpose has also been read into paragraph (c): *Curran* (1977) 38 CCC (2d) 151, at pp. 156-157 (Alta CA). Confusingly, there are however, dicta which refer to a requirement of what is generally referred to as "knowledge" on the part of the accessory. See eg Dickson J in *Dunlop*, cited in n. 5 above, at p. 110:

> "A person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended .... One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, ie, that their presence was with knowledge of the intended rape."

(c) abets any person in committing it.[7]

The section appears to distinguish between an actual perpetrator, an aider, and an abettor. In the early decision in *Roy*,[8] aiding and abetting were indeed discussed separately:

> To abet is to be personally or constructively present[9] at the commission of an offence, and to assist in the criminal act; but to aid is to help, or in any way to promote, facilitate or bring about the accomplishment of any criminal purpose by another, and this may be done without being present when the offence is perpetrated.[10]

The significance of the distinction is debatable; the Crown has not generally been required to particularise the alleged mode of participation: in *Harder*,[11] the Supreme Court of Canada ruled that an "aider and abettor may be indicted as principal simpliciter.".[12]

2.2 Section 21(2) of the Code deals with cases of joint enterprise. It provides:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who know or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

The section, on a literal construction, allows for the assessment of liability on an objective basis. However, Stuart[13] observed in 1987 that such a basis for criminal liability was contrary to fundamental principles of justice, and ought, therefore, to be open to challenge

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[7] The original 1892 Code contained a fourth paragraph: a counselling and procuring provision. This matter is now considered independently at s. 22 (see para. 3.2 below). Why it was removed from the general parties section is unclear. See Stuart, *op. cit.*, fn. 8 to p. 502, referring to *Martin's Criminal Code* (1955), pp. 63-64.

[8] (1900) 3 CCC 472 (Que QB).

[9] Despite his reference to the concept of presence, Würtele J, at p. 475 and p. 476, citing Taschereau's *Commentaries on the Criminal Code*, went on to make clear that the common law rule which distinguished between the principal in the second degree, present at the scene of the crime, and the accessory before the fact, participating at an earlier stage, had been abolished.

[10] *Ibid.*, at p. 475.

[11] [1956] SCR 489 (Cartwright J dissenting, holding that the charge should specify either a personal act or merely aiding (at p. 509)).

[12] At p. 494, per Fauteux J. It is thus not even necessary to mention s. 21 at all, or any part of it, to render a nonperpetrator criminally liable to the same extent as the principal: Stuart, *op. cit.*, p. 502.

[13] *Op. cit.*, at p. 512.

under section 7 of the Canadian Charter of Rights and Freedoms.[14] In the following year, his view was shown to be correct, in *Logan*.[15] In that case, the defendants were charged as parties to an attempted murder committed in the course of an armed robbery on a convenience store. The trial judge directed the jury that the parties to the robbery could be convicted of the attempted murder under section 21(2) if they knew or ought to have known that one participant would probably kill. On appeal, the Ontario Court of Appeal held that the attempted murder convictions should be quashed. To the extent that section 21(2) permitted a conviction for attempted murder on the basis of the objective foreseeability of that crime being committed, a lower mental requirement than would have to be proved against a perpetrator himself, it was contrary to the principles of fundamental justice alluded to in the Charter. The court was, however, of the opinion[16] that a requirement of subjective foresight of the collateral crime as a probable consequence of the joint venture would not contravene the Charter.[17]

Other matters

3.1 *Incitement*: The Canadian equivalent to the common law offence of incitement is the offence of counselling, under section 422[18] of the Code. The section is expressly inapplicable to a situation in which the offence counselled is committed; in such circumstances, the counsellor becomes liable under section 21 or 22. Counselling appears to have no technical meaning, but simply denotes advising or recommending. There is no

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[14] The Charter is entrenched in Schedule B, Part I of the Constitution Act 1982. Section 7 reads:

> **Life, liberty and security of person.**
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[15] (1988) 46 CCC (3d) 354.

[16] *Ibid.*, at p. 400.

[17] It is a little difficult to perceive the ultimate effect of the decision in *Logan*. The Court appeared to object, not to the fact that a lower mental element was required of the non-perpetrating party than of the perpetrator himself (hence their approval of a hypothetical conviction with subjective foresight of the probability of the attempted murder; attempted murder itself, of course requires an intention to kill on the part of the perpetrator); but to the very nature of the objective basis for liability written into section 21(2) of the Code: see para. 2.2. It will be interesting to see if the issue of the Charter is raised in a case (should one arise) of aiding and abetting etc, a crime for which the mens rea of perpetration itself is negligence (eg driving without due care and attention) or even of strict liability (eg driving while uninsured).

[18] The section reads as follows:

> Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
> (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and is liable to the same punishment to which a person who attempts [punishment for attempt is set out in s. 421] to commit that offence is liable; and
> (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

express reference to mens rea in section 422; the courts have inclined to a view that the defendant must intend that the offence counselled be committed.[19]

3.2 *Divergent offences*: As stated above,[20] prior to 1955, counsellors and procurers were dealt with under a fourth paragraph to section 21(1). They[21] are now considered separately under section 22, a provision which also addresses instances where the party to whom the counselling is directed commits the offence counselled, but in a manner different from that contemplated by the counsellor, and where the party counselled commits further or different offences from that originally counselled. The section reads:

> (1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled or procured is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled or procured.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

The general provision concerning parties to offences, section 21(1), does not contain an express reference, as in section 22(1), to different modes of commission of the offence contemplated by the secondary party. However, case law related to the former achieves substantially the same effect.[22] A more marked departure from the Canadian law of aiders and abettors as found in section 21(1) can be seen in section 22(2), which extends criminal liability to the counsellor for those offences which he *ought to have known* were likely to be committed in consequence of the counselling. There is virtually no Canadian authority on

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[19] There is no requirement that the person to whom the counselling is directed should have the mens rea of the counselled offence. (Contrast the position in English law where there is such a requirement: *Curr* [1968] 2 QB 944, see Consultation Paper, paragraphs 2.128-2.129 above.)

[20] Para 2.1, n. 7.

[21] See s. 22(3) below.

[22] *Bainbridge* [1960] 1 QB 129; *DPP* v. *Maxwell* [1978] 1 WLR 1350.

section 22,[23] and, therefore, the relationship between particularly, section 22(2), and the Charter of Rights and Freedoms, has not been considered.[24]

Reform Proposals

4.1 The most thorough analysis and review of Canadian law in the field relevant to this Consultation Paper was undertaken by the Law Reform Commission of Canada (hereafter in this section "LRCC"); its conclusions were published in 1985.[25] The following paragraphs are concerned with the aspects of that publication most relevant to the current exercise.

4.2 The LRCC investigated the subjects of participation and inchoate offences simultaneously on account of its perception (which we share)[26] of them as "two aspects of one unified concept, the *furtherance* of crime.".[27] The logical conclusion from this perception would seem to be a scheme of criminal liability in which participation and inchoate offences were replaced by an offence of doing an act in furtherance of a crime.[28] Such a scheme would, in a realistic manner, ascribe liability to parties, based on their own conduct, rather than that of those to whom they render assistance or encouragement.[29] However, as the LRCC observed, "[t]he life of the law ... has not been logic but experience",[30] a maxim that in this instance relates to the observation that intuition tends to label a perpetrator as being more reprehensible than an accessory, and that punishment is generally measured not only according to the harm intended, but also by reference to the harm resulting from a prohibited act.[31] Consequently, while the scheme proposed by the LRCC is based on the

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[23] Section 22 was directly considered in *Vallieres* (1970) 9 CRNS 24, a decision of the Quebec Queen's Bench. The objective basis for the assessment of liability in section 22(2) appears to have been disregarded: A leader of the FLQ, a Quebec terrorist organisation, had been convicted of counselling "through his attitudes, actions, writings or otherwise" the explosion of a bomb at a shoe factory, in which a switchboard operator was fatally injured. His conviction for manslaughter was overturned, one of the bases being there was no evidence to indicate that the accused had participated in a decision to place a bomb in that factory: *Bainbridge* (see Main Paper, paragraphs 2.70ff above) was relied on as authority that the accused had to know the type of offence which was intended by the principal.

[24] As to the relationship between the Charter and section 21(2) of the Code (relating to the common purpose doctrine), see para. 2.2 above.

[25] Law Reform Commission of Canada, Working Paper 45, *Secondary Liability: Participation in Crime and Inchoate Offences*.

[26] To the extent that we believe that types of behaviour currently dealt with under the separate areas of secondary participation and incitement ought to be considered together. See Main Paper, paragraphs 4.14-4.16ff above.

[27] LRCC, *op. cit.*, at p. 2.

[28] *Ibid.*, at p. 26.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

unifying concept of furtherance, the distinction between participation in complete and incomplete crimes is maintained. It was recommended that those liable in respect of complete crimes ought to be divided into:

(1) perpetrators;
(2) helpers; and
(3) inciters;
(4) conspirers.

Similarly, those liable in respect of incomplete crimes should be divided into:

(1) inchoate perpetrators (attempters);
(2) inchoate helpers (where the person helped does not commit the crime); and
(3) inchoate inciters (where the person incited does not commit the crime).
(4) conspirers.[32]

The proposed scheme would introduce a new offence of inchoate aiding, the LRCC being of the opinion that the criminality of the assister's acts should not depend on the commission of a principal offence.[33] Furthermore, the common purpose rule currently found in section 21(2) of the Code would disappear. The LRCC considered objectionable the fact that a person could be treated as a party to an offence, the commission of which he *ought to have known* was a probable consequence of the carrying out of the common purpose, and that the subsection penalised a person who did not perform any substantial act in furtherance of the offence, but merely agreed to its commission.[34]

4.3 In their analysis of possible mental requirements for the furtherance offences, the LRCC assessed the terms "intent", "negligence" and "recklessness".[35] Considering crimes to be "attacks on basic values",[36] they deduced that acts done with intent to further an

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[32] *Ibid.*, and *ibid.*, at p. 49, Recommendation 2. It was also proposed that the new scheme would set out three ways of perpetrating: perpetration by oneself; perpetration through an innocent agent; and perpetration jointly with others: *Ibid.*, at p. 27. Those liable in respect of an incomplete offence would be subject to half the penalty for the completed crime (*ibid.*, at p. 27 and at p. 49, Recommendation 3). We consider that, while such a penalty may well be apt in a straightforward case of attempt, it is perhaps less appropriate in certain instances of furtherance; situations are conceivable where the instigating party, is, objectively, more at fault than the perpetrator (as in the case of the "brains" behind a complex fraud operation, whose less intelligent, but far from innocent, lackeys are the parties who actually utter the relevant fraudulent documents).

[33] *Op. cit.*, at p. 28. The requirement of the commission of the principal offence is criticisable from the points of view of both principle and practice; Mr Francois Handfield, co-ordinator of the Substantive Criminal Law Project and a prosecutor in the province of Quebec for twelve years, observed, in the LRCC communique released with Working Paper 45 (dated December 2 1985), "I was aware of many cases in which the police were frustrated by their inability to lay criminal charges in such circumstances where there was significant help by one party, but no actual commission of the offence by the other."

[34] *Ibid.*

[35] *Op. cit.*, at p. 28-31.

[36] *Ibid.*, at p. 29.

offence would be an attack on those values themselves.[37] On the other hand, negligence could not constitute such an attack, and ought only to attract criminal sanctions in exceptional situations.[38] As to the intermediate case of recklessness, the LRCC took this term to signify "knowingly incurring a serious unjustifiable risk.".[39] Whether an act of otherwise reckless furtherance would be justifiable would depend on[40] the gravity of the harm risked, the magnitude of the risk, and the burden on the party doing the acts furthered of behaving otherwise; the more serious the crime furthered, and the greater the likelihood of its commission, the stronger the justification for imposing criminal liability on the furtherer.[41] It was also observed[42] that in cases of furtherance, the interposition of the perpetrator between the actions of the furtherer and the commission of the crime means that a true causal link between the furtherer and the crime cannot be established:[43] "the more responsible [the perpetrator], the less responsible the original furtherer."[44] The LRCC further recognised[45] the primary tension present in this area of law, between the interest in crime prevention, which, if given absolute precedence, would render unlawful, say, the lending of X's car to Y by the former, if he suspected the latter might use it to go and kill Z, and that against overcriminalisation, which dictates in favour of X's being able to do an act unchallenged which is prima facie lawful. Considering the above, the LRCC concluded[46] that, in cases of furtherance, criminal liability should only attach to one who acts intending[47] to further a crime or knowing[48] that his behaviour is certain to do so.[49]

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[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] By analogy with the civil law of negligence: *ibid.*, at p. 30.

[41] *Ibid.*

[42] *Ibid.*

[43] See Main Paper, paragraphs 2.15ff.

[44] LRCC, *op. cit.*, at p. 30.

[45] *Ibid.*

[46] "No one should be liable for furthering an offence without intending that the offence be committed.": *ibid.*, at p. 36, Conclusion (1); see also *ibid.*, at p. 50, Recommendation (3)(b).

[47] To reinforce their argument in favour of a mens rea requirement of intent, the LRCC, *op. cit.*, at p. 31, referred to the ordinary meaning of words such as "attempting", "counselling" and "inciting" which imply that the attempter, counsellor or inciter has as his purpose the commission of the offence attempted, counselled or incited.

[48] We have noted (see Main Paper, paragraph 2.53) that knowledge is an inappropriate description of an accessory's attitude towards the commission of the principal offence, as it is impossible to be certain, to the absolute degree that the word "knowledge" imports, of the future conduct of another. See also n. 49 below.

4.4 On the subject of actus reus, the LRCC considered that conduct in clear and substantial furtherance[50] ought to be necessary. However, it was concluded that the satisfaction of such a requirement should be a matter of fact in each case;[51] owing to the quantity and varied nature of criminal offences, it would be impossible, in practical terms, to lay down an appropriate, universal definition.

4.5 On the subject of divergent offences,[52] as when D assists or encourages P to commit crime A, and P in fact commits crime B, the LRCC noted[53] that there would be situations where liability would seem appropriate: where, for instance, P asks D to lend him his gun in order that P may shoot at V and wound him, D lends him the gun as requested and P, as he intended all along, shoots V dead, D should be liable at least for some form of homicide. On the other hand, situations could conceivably arise where the opposite seems true:[54] if P asked D to lend him his gun so that he could plant it on V and allege that V had stolen it, whereupon, having been lent the gun, he kills V as before, D should have a reasonable defence to homicide. The LRCC concluded[55] that where the principal offence committed differed from that intended by the party assisting or encouraging, there should be no liability unless the difference in question relates only to the identity of the victim[56] or the degree of harm caused by its commission.[57]

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[49] The LRCC's treatment, particularly of the words "intent" and "recklessness" serves to highlight a sentiment to which we also adhere; namely that, in assessing the liability of accomplices, whose liability, by definition, is inextricably linked with the behaviour of another party, the principal, traditional mens rea terminology is inappropriate. "Intent" and "recklessness" are words that can only be used in a practical sense when describing one's attitude to *one's own* conduct.

[50] *Op. cit.*, at p. 38.

[51] *Ibid.* More specific questions include whether, in the case of counselling etc, the act of persuasion need have an effect on the mind of the person counselled: under the LRCC's proposed scheme, the liability of the counsellor would depend solely on his own behaviour - the party counselled need not even be aware of the acts of counselling (*ibid.*, at p. 39) (a case involving aid that was useless or not received would be similar (*ibid.*, at p. 40)). As to aiding and abetting, the primary consideration of the LRCC (*ibid.*, at p. 40) concerned liability arising from presence at the scene of commission of an offence. A conclusion was drawn along the lines of current Canadian law that such presence cannot give rise to liability in the absence of an intent to help or encourage, coupled with encouragement or assistance as a matter of fact.

[52] LRCC, *op. cit.*, at pp. 30-31.

[53] *Ibid.*, at p. 30.

[54] *Ibid.*

[55] *Ibid.*, at p. 36, Conclusion (2).

[56] As where D lends P his gun, intending that P should murder X, but P in fact murders Y.

[57] As where D lends P his gun to wound X seriously, but the wounds in fact prove fatal.

4.6 As to the defence of withdrawal, or, as it is known in Canada, "abandonment",[58] the LRCC concluded,[59] in accord with the present law,[60] that abandonment should not be valid as a defence, but should be taken into account as a mitigating factor at the sentencing stage.

4.7 The LRCC also discussed[61] the relevance of the offence furthered proving to be impossible. It was observed that impossibility itself could take several forms. A crime may be impossible in fact; either as a matter of circumstances: there is no money in the pocket from which X tries to steal; or in general: there is no way, we believe, of killing by voodoo. Alternatively, the crime may be impossible in law; either under the particular circumstances: the goods cannot be stolen by X because, unknown to him, they are his own; or because of the state of the law: the crime intended, say, suicide, is no longer an offence. According to the LRCC,[62] the putative pickpocket above (and, by implication, any one who furthered his behaviour) ought to be liable; neither his culpability nor his dangerousness[63] are reduced by the absence of money from the victim's pocket. On the other hand, the party attempting to kill by voodoo, is, despite the reprehensibility of his motives, indulging in an activity generally perceived as being incapable of bringing about the desired result. In such a case, where the impossibility is "inherent in the nature of things",[64] the LRCC concluded that there ought not to be liability. As to the person attempting to steal his own goods, and the person attempting to commit suicide, wrongly believing it to be an offence, the LRCC observed, simplistically put, that there was no law to be broken, and that there was not, nor should there be, an all-encompassing fall-back provision allowing for a charge of attempting to break the law in general. The overall conclusion of the LRCC[65] on this issue was that impossibility should not affect the liability of the party attempting or furthering the commission of the crime which, in the event, is impossible, except where the crime attempted is inherently impossible,[66] or where the acts in question do not qualify in law as being criminal.[67]

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[58] LRCC, *op. cit.*, at pp. 34-35.

[59] *Ibid.*, at p. 35, and p. 36, Conclusion 4.

[60] The Code is silent on the matter. Relevant cases include *Goodman* (1872) 22 UCCP 338 and *Kosh* (1964) 44 CR 185 (Sask CA).

[61] LRCC, *op. cit.*, at pp. 32-33.

[62] *Ibid.* See also *ibid.*, at p. 36, Conclusion 3.

[63] In general, pockets have money in them, so pickpockets generate apprehension, even in a situation where the pocket in question is empty.

[64] LRCC, *op. cit.*, at p. 32.

[65] *Ibid.*, at p. 36, Conclusion 3.

[66] See the voodoo example above.

[67] See the examples of "stealing" one's own goods and attempting suicide, above.

4.8 The LRCC sought to clarify the position of furtherers in cases where the person furthered does the acts intended but is not liable as a perpetrator.[68] Their approach drew a distinction between situations in which the perpetrator was not liable on account of his having a justification[69] for his acts, an excuse,[70] or an exemption[71] from liability:[72]

> (5) Liability for furthering should be affected by the primary offender's liability as follows:
>
> (a) where the primary offender commits no offence because he has a justification, there should be no secondary liability;
>
> (b) where he commits an offence but has an excuse, there should be full secondary liability for furthering a complete offence:
>
> (c) where he commits no offence by reason of an exemption or lack of the requisite mental or physical element, there should be secondary liability for furthering an incomplete offence.

While the LRCC does not analyse in depth the methodology behind these distinctions, their conclusion seems to involve a move towards a broader theoretical approach to secondary liability in which liability is not contingent upon a committed offence but upon a wrongful act.[73] The third "exemption" category, allowing for liability for an incomplete offence,[74] is novel; it is rationalised by the LRCC[75] as providing a compromise position which avoids holding the furtherer liable for an offence that has not been committed, while not allowing him complete acquittal when he in fact tried to further a specific crime.

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[68] LRCC, *op. cit.*, at pp. 35-36. The lack of clarity in the present law is primarily a result of the wording of section 21 of the Code, which provides that aiders and abettors are only parties to crimes *committed* by principal offenders. Whether an offence committed by a primary offender with a valid defence qualifies for this purpose as "committed" is uncertain.

[69] Such as to render the "offender's" act quite lawful.

[70] Such as to exculpate the "offender", while the act itself remains unlawful.

[71] Eg, immaturity.

[72] LRCC, *op. cit.*, at p. 36, Conclusion 5.

[73] See eg, GP Fletcher, *Rethinking Criminal Law*, (1978), p. 665.

[74] And therefore, a maximum penalty of half that for the completed offence. See n. 32 to para. 4.2, above.

[75] *Op. cit.*, at p. 36.

The Canadian Draft Code

4.9 The LRCC has produced two Reports[76] on the subject of a new Criminal Code for Canada. The Draft Code contained therein contains provisions relating to furtherance which largely correspond to the scheme proposed in Working Paper 45.[77] The concept of furtherance is recognised as the unifying factor behind the provisions, but a distinction between involvement in complete and incomplete crimes is maintained.[78] Clause 4(2) deals with furtherance of a complete crime and states:

> Everyone is liable for furthering a crime and is subject to the penalty for it if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.

The clause lists the various ways of furthering, and differs in one respect from the earlier proposals in the Working Paper: it imposes liability for furthering where someone "uses another person to commit the crime". The detailed provisions in Working Paper 45 regarding non-culpable principals[79] are not repeated in the Report. Indeed, the Report commentary suggests that the inclusion of "using" as a form of furtherance "makes a special 'innocent agent' rule unnecessary.".[80]

4.10 Clause 4(2) contains no express reference to a mental element for furtherance. Recourse must therefore be had to the residual provision governing culpability in clause 2(4)(d), which reads:

> ... Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose.

"Purposely" itself is defined in clause 2(4)(b):

> (i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

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[76] Report 30 Vol. 1, *Recodifying Criminal Law*, (1986); Report 31, *Recodifying Criminal Law*, (1987) (a revised and enlarged edition of Report 30).

[77] See n. 25 and paras. 4.1-4.8 above.

[78] As in Working Paper 45: see para. 4.2 above.

[79] See para. 4.8 above.

[80] The correctness of this view is perhaps questionable: in innocent agency cases, the crux of the theoretical problem is that the agent has been used to perform acts which do not, of themselves, constitute an offence. This remains the case even when the party acting through the agent is described as "using" him. That word could have that effect, rendering unnecessary a general innocent agency provision if clause 4(2) were taken to require furtherance of an *actus reus only* by the perpetrator. This is a plausible reading of the wording of that clause, but it would constitute a departure from traditional complicity theory that the LRCC gave no indication of intending to make.

(ii) A person acts purposely as to a consequence if he acts in order to effect:
(A) that consequence; or
(B) another consequence which he knows involves that consequence.

4.11 Involvement in incomplete offences is governed by clause 4(4) which mirrors clause 4(2) except that a guilty "attempted furtherer" is only subject to half the penalty for that crime:

> ... Everyone is liable for attempted furthering of a crime and is subject to half the penalty for that crime if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.

The provision follows the recommendation of Working Paper 45 by introducing an inchoate "helping" offence.[81]

4.12 Clause 4(6) adopts the approach of Working Paper 45 to divergent offences:[82]

> (a) ... No one is liable for furthering or attempting to further any crime which is different from the crime he meant to further.
>
> (b) ... Clause 4(6)(a) does not apply where the crime differs only as to the victim's identity or the degree of harm or damage involved.

4.13 In Working Paper 45, the LRCC advocated the abolition without replacement of the "common purpose" provision in section 21(2). This is a theme which has not been wholly followed through to the Report stage; clause 4(6)(c) incorporates a rule analogous to that in section 21(2), but restricts liability to crimes which the furtherer actually *knows* to be probable consequences of the prosecution of the common purpose. It reads as follows:

> ... A person who agrees with another person to commit a crime and who also furthers it, is liable not only for the crime he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering.

4.14 Thus far, the LRCC's proposals on the subject of furtherance have not progressed beyond the Report stage. However, recodification of the General Part of the Criminal Code has since been considered by the Standing Committee on Justice and the Solicitor General.[83]

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[81] See para. 4.2 above.

[82] See para. 4.5 above.

[83] *FIRST PRINCIPLES: Recodifying the General Part of the Criminal Code of Canada*, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, (February 1993), (hereafter "Standing Committee"), Chapter XIV(f).

The Committee was attracted to the approach adopted by the LRCC[84] of including under the heading of "furthering" a variety of means of participating in the commission of offences,[85] and expressed the opinion that the rules relating to furthering should apply to those who "intentionally"[86] assist or encourage others in the commission of offences.[87]

4.15 As to the doctrine of common purpose, the Committee noted that the existing provision, as it applied to murder, had been found unconstitutional in that it created objective liability.[88] Rather than repeal that rule in its entirety, the Committee expressed a preference to retain a provision on common purpose that contained a subjective mental element,[89] such that one would be liable for a crime that one knew was a probable consequence of pursuing the common purpose.

4.16 In response to the recommendations made by the Committee, the Ministry of Justice of Canada produced, in June 1993, a White Paper, detailing proposals to amend the general part of the Criminal Code.[90] The White Paper contains a clause[91] that approximates to section 21(1) of the current Criminal Code, replacing the reference to "abet[ting]" in section 21(1)(c) with a reference to "encourag[ing]", and adding a fourth subclause,[92] which makes a person a party to an offence if he "counsels any person to be a party to it, where the person counselled is afterwards a party to it",[93] and a general proviso that renders the aider, encourager or counsellor liable even if the offence was committed "in a way different from that which was aided, encouraged, or counselled."

4.17 Clause 21(2) of the White Paper would effectively implement the Committee's recommendation on the common purpose rule,[94] stating that liability for a collateral offence committed during the course of a criminal enterprise will be incurred by the co-enterpriser who "[is] aware of a substantial risk" of the commission of that collateral offence.

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[84] See paragraph 4.9 above.

[85] Standing Committee, at p. 66.

[86] In the sense of "purposively". The Standing Committee discusses the fault element of crimes in chapter V of the Report, and appears to proceed on the basis that "intention" and "knowledge" are different mental states. See Standing Committee, at p. 21.

[87] *Ibid.*, at p. 67.

[88] See paragraph 2.2 above.

[89] Standing Committee, at p. 67.

[90] *Proposals to amend the Criminal Code (general principles)*, (June 1993).

[91] Clause 21(1).

[92] Clause 21(1)(d).

[93] A charge of counselling under the current Code is only appropriate where the offence counselled is not committed. See para. 3.1 above. An equivalent of that latter offence is provided for in clause 24.1 of the White Paper.

[94] See para. 4.15 above.

APPENDIX

PART III: NEW ZEALAND

Introduction

1.1 The criminal law in New Zealand was first enacted in the form of a comprehensive code in 1893. It and other Acts were "consolidated" in the Crimes Act 1908; the latter, along with other Acts, being "consolidated and amended" by the Crimes Act 1961.[1] The 1961 Act is exclusive in its scope; section 9 precludes proceedings for common law offences.[2]

Parties to Offences

2.1 Section 66 of the Crimes Act 1961 contains the following provision:

> **Parties to offences** - (1) Every one is a party to and guilty of an offence who-
> (a) Actually commits the offence; or
> (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
> (c) Abets any person in the commission of the offence; or
> (d) Incites, counsels or procures any person to commit the offence.

This subsection was formulated against a background of the common law principles governing accessorial liability and, as a result, traditional terminology is used. However, as to the interpretation of the Act and the status of common law principles, the New Zealand Court of Appeal observed in *Paterson*[3] that "a common law principle as to liability cannot be applied in New Zealand if the relevant provisions of the Crimes Act are plainly inconsistent with the application of that principle". However, as the Act does not offer an exhaustive set of definitions relevant to the criminal law,[4] the Courts have had to turn to certain common law principles for assistance in construing the words of this particular provision and other areas on which the Crimes Act is silent.

2.2 Construction of section 66 generally conforms to the common law rules governing complicity. However, one clear departure concerns the common law rule that to be an aider and abettor, an accomplice had to be present at the commission of the offence. It has been held that, under this provision,[5] the presence or absence of an aider from the scene of

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[1] See generally Sir F Adams, *Criminal Law and Practice in New Zealand*, (2nd ed., 1971), Chaps 1-2.

[2] With exceptions that do not require consideration in this Consultation Paper.

[3] [1976] 2 NZLR 394, at p. 396.

[4] For instance, the mens rea required of a party, to found liability as an accomplice.

[5] *Baker* (1909) 28 NZLR 536. This case involved interpretation of s. 90 of the Crimes Act 1908 which corresponds to s. 66 of the current Crimes Act.

commission of an offence is of no significance.

2.3 Section 66(2) contains a further provision dealing with joint enterprise liability. It provides:

> (2) Where two or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

The subsection is cast in subjective terms,[6] and contrasts with, for example, the treatment of the subject matter under the Codes of Queensland and Western Australia.[7] What is unclear however (although we consider this to be a matter of a drafting oversight, rather than an issue of substantive significance), is *who* actually needs to be aware of the probability of the commission of the offence collateral to the primary unlawful purpose. The subsection merely states that the probability must be *known*. This issue however, does not appear to have troubled commentators[8] or the Courts, and we therefore proceed on the basis, as they have done, that the subsection requires knowledge of the probability of the commission of the collateral offence on the part of all persons alleged to be non-perpetrative parties to collateral offences committed in the prosecution of the joint enterprise.

2.4 There, was, at one stage, little authority on section 66(2), the result of which was that the Courts had scant opportunity to consider the actual meaning of "probability". There is authority for the view that the courts treated the term as self-explanatory: "not to be elaborated, [and that] the jury [should be] left to ascribe to it its meaning in every day usage".[9] In more recent years however, it has been decided that "probable" corresponds to a "real risk"[10] or an event that "might well happen".[11]

2.5 The exact relationship between subsections (1) and (2) appears to be a matter of some confusion. In *Currie*,[12] it was stated that subsection (1) dealt with the circumstances which may render persons liable as parties to a particular offence and that a common intention

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[6] That the test is subjective (*pace* RA Caldwell, *Garrow and Caldwell's Criminal Law in New Zealand* (6th ed., 1981), at p. 68) is illustrated by the omission from the 1961 Act of the words "or ought to have been", which, in earlier Acts, appeared before "known". See Adams, *op. cit.*, p. 191.

[7] See Appendix, Part 1, paragraph 2.4 above.

[8] See e.g., P. Gillies, *The Law of Criminal Complicity*, (1980), pp. 122-123.

[9] Gillies, *op. cit.*, at p. 122. He cites in support *Morrison* [1968] NZLR 156, in which the Court gave no explanation to the jury of the meaning of the term "probable".

[10] *Tomkins* [1985] 2 NZLR 253.

[11] *Hamilton* [1985] 2 NZLR 245.

[12] [1969] NZLR 193, at pp. 208-210.

between the parties may be equally relevant in fixing a person with liability under either subsection. However, it is only under subsection (2) that the party is fixed with liability not only for offences within his actual contemplation but for offences contemplated as merely a probable consequence of the prosecution of the common purpose. This would suggest that subsection (2) provides a specific form of liability, broader than that for traditional complicity, to deal more appropriately and expediently with joint enterprise cases. It has been argued,[13] on the other hand, that section 66(2) is merely a particular instance or partial definition of section 66(1) and does not expand or offer any form of liability distinct from the methods of participation in crime instanced in section 66(1), paragraphs (b)-(d).[14]

2.6 Developments in the common law, which may affect the interpretation of the Crimes Act,[15] have led to a position in which section 66(2) may impose a more onerous duty on the prosecution than subsection (1). The line of case law culminating in *Maxwell*[16] indicates that a defendant may be liable as an accomplice if he foresees the commission of any of a limited number of offences, and one of those offences is in fact committed. That is to say, an offence need only be foreseen as a *possibility*,[17] whereas under section 66(2), the offence must be foreseen as a *probability*.[18]

Other Issues

3.1 *Inchoate Offences*: As would be expected in a jurisdiction based initially on purely common law principles, the Crimes Act also includes the full range of inchoate offences. Incitement is considered in section 311(2).[19] This provision is somewhat peculiarly

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[13] See e.g. Gillies, *op. cit.*, at p. 122; KE Dawkins, "*Parties, conspiracies and attempts*", Essays on Criminal Law in New Zealand. Towards Reform?, Victoria University of Wellington Law Review Monograph 3, (1990), 117, at p. 127.

[14] We have sought to submit, however, that liability in a case of joint enterprise proceeds on a different basis than in an instance of traditional accessoryship. For our reasoning see Consultation Paper, paragraphs 2.108-2.125.

[15] See para. 2.1 above.

[16] *DPP* v. *Maxwell* [1978] 1 WLR 1350. See Main Paper, paragraphs 2.70-2.79 above.

[17] See also paragraph 3.2 below.

[18] As to definitions of the latter, see para. 2.4 above.

[19] Section 311(1) deals with attempt. The provision in its entirety reads as follows:

> **Attempt to commit or procure commission of offence** - (1) Every one who attempts to commit any offence in respect of which no punishment for the attempt is expressly prescribed by this Act or by some other enactment is liable to imprisonment for a term not exceeding ten years if the maximum punishment for that offence is imprisonment for life, and in any other case is liable to not more than half the maximum punishment to which he would have been liable if he had committed that offence.
> (2) Every one who incites, counsels or attempts to procure any person to commit any offence, when that offence is not in fact committed, is liable to the same punishment as if he had attempted to commit that offence, unless in respect of any such case a punishment is otherwise expressly provided by this Act or by some other enactment.

worded,[20] being directed against those who incite, counsel or attempt to procure. The first two elements[21] of the subsection are known to English law, but the third appears to be a departure from traditional common law principles.

3.2 *Divergent Offences*: Section 70 of the Crimes Act deals with the situation where the offence committed by the principal is not the exact offence assisted or encouraged by the accessory. It provides as follows:

> **Offence committed other than offence intended** - (1) Every one who incites, counsels, or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was incited, counselled, or suggested.
>
> (2) Every one who incites, counsels, or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such inciting, counselling, or procuring, and which the first-mentioned person knew to be likely to be committed in consequence thereof.

The section is limited to those accessories who "incite, counsel, or procure"[22] the commission of the principal offence; those who assist its commission are outside the scope of the provision. It appears that section 70(1) is limited to cases where the offence contemplated by the accessory is committed, but in a manner not so contemplated.[23] Section 70(2) would appear to become operative, subject of course to the inciter, counsellor or procurer having the requisite mens rea, when there is a more material divergence in the crime committed by the principal from the crime incited, counselled or procured.[24]

Reform Proposals

4.1 The most recent New Zealand reform project is the Crimes Bill of 1990. It has however not proceeded beyond the Bill stage, and there appear to be no plans to take this

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[20] Compare however the Queensland Code, s. 539. See Appendix Part 1, paragraph 2.3, n. 12 above.

[21] It should be noted that section 311(2) expressly provides that the offence incited etc. has not in fact been committed; ie "incite" has a different meaning to that in section 66(1)(d); the latter presupposes the commission of the offence incited.

[22] Although, in principle, there is no reason why such a rule should not apply to all forms of secondary participation, provided always that the offence committed is in substance within the contemplation of the secondary. See eg Adams, *op. cit.*, p. 182, who refers to the judgment of Edwards J in *Baker* (1909) 28 NZLR 536, at p. 543: "In my opinion, the words 'the offence' in section 90 of 'The Crimes Act, 1908,'[which corresponds to s. 66 of the current Crimes Act] mean some offence of the character facilitated by the person indicted, and not a particular offence at a particular time and place and in a particular manner."

[23] E.g., murder with a knife, where the accomplice contemplated the use of a gun.

[24] E.g. where X encourages Y to pick the pocket of Z, knowing that Z is likely to discover Y during the theft, resist and become the victim of a robbery upon Y's assault. See generally Dawkins, *op. cit.*, at pp. 128-129.

particular scheme[25] any further. The following paragraphs relate to the provisions of the Bill most relevant to the current exercise.

4.2 Clause 54 of the Bill expands on the opening part of section 66(1)[26] of the current Crimes Act. It makes clear that all parties to an offence are guilty of and equally liable to the punishment prescribed for that offence. The subsequent clauses elaborate the various ways in which one can be such a party.

4.3 Clause 55 substantially restates section 66(1)(a)[27] of the Crimes Act; the main difference is that the word "personally" is utilised in place of "actually". The change appears to reflect a preference for "personally" as a term that refers to the situation of a person committing an offence by his own hand alone. It also clearly differentiates this mode of commission from that involving the use of an innocent agent.[28]

4.4 Clause 57(1) replaces the existing categories of aiding, abetting, and inciting, counselling or procuring under section 66(1)(b)-(d) of the current Act with two new modes of participation. It reads as follows:

> Every person is a party to an offence who, knowing the circumstances constituting the offence or intending the consequences of the offence, -
>
> (a) Helps any person to commit the offence; or
> (b) Does or says anything to bring about the commission or continuance of the offence.

Mr Dawkins[29] is of the opinion that the clause is intended to serve two purposes: the first is to restate the rules as to participation in an offence in more modern, familiar terms; the second is to specify the mental element required for these newly-described modes of participation. However, as he himself observes,[30] fresh interpretive difficulties could arise under the terms of the Bill. The express reference to "purpose" in section 66(1)(b) (the "aiding" provision) of the Crimes Act is not reproduced in clause 57(1)(a), although paragraph (b) arguably carries a purposive implication in the use of the words "to bring about". Furthermore, the term "does or says anything" in paragraph (b) does seem extremely vague.[31] If the paragraph is supposed to catch the forms of participation other than helping, which currently appear in section 66(1)(c)-(d) then use of the words

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[25] A new Crimes Bill, which will be open to public submissions is to be introduced: see *Commonwealth Law Bulletin* Vol. 18, No. 1, January 1992.

[26] See para. 2.1 above.

[27] *Ibid.*

[28] See *Paterson* para. 2.1, n. 3.

[29] *Op. cit.* in n. 13 above, at p. 122.

[30] *Ibid.*

[31] *Ibid.*

"encourage" and "procure" would arguably have sufficed.[32]

4.5 Clause 57(2) is new in its terms, and puts into putative statutory form the possibility of accessory liability due to presence at the scene of an offence.[33] It reads:

> A person may be a party to an offence by virtue of subsection (1) of this section merely by being present at the scene of the offence if -
>
> (a) That person knows that his or her presence will encourage any other person to commit or to continue the offence; or
> (b) That person fails to exercise any authority that he or she has in the circumstances to prevent the commission of the offence.

The clause imposes liability in a situation of presence where it can be shown that the defendant had knowledge that his presence would encourage another person to commit or continue the offence in question, and (through the reference to clause 57(1)) that that person was in fact encouraged.[34]

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[32] The Crimes Consultative Committee thought that the circumstances/consequences distinction in the first sentence of the clause was unnecessarily complicated. The Committee perceived the purpose of their proposed amendments to the clause as being to give clear expression to the following ingredients of secondary liability: first, the person assisting or encouraging must be aware of the elements of the offence contemplated; second, he must act with the purpose of achieving or assisting the commission of the offence; third, the secondary party's conduct must contribute to the commission of the offence: Crimes Consultative Committee, Report on The Crimes Bill 1989, (1991), pp. 29-30. In order to avoid confusion over the circumstances/consequences distinction, the Crimes Consultative Committee recommended that the accessory must know "the general nature of the offence" being, or to be committed. They further concluded that the purpose requirement be extracted from subclause (1)(b) such that it would apply clearly to both the assistance and encouragement aspects of secondary liability:

> **57. Person who brings about or helps commission of offence** - (1) Every person is a party to an offence who, knowing the general nature of the offence that is to be, or is being, committed, does, says or omits anything for the purpose of -
>
> (a) Bringing about the commission or the continuance of the offence; or
> (b) Helping any other person to commit or continue the offence -
>
> where, what is done, said, or omitted contributes to the commission or continuance of the offence.

[33] See Main Paper, paragraphs 2.25-2.30 above.

[34] The Crimes Consultative Committee (see n. 32 above) in their clause 57(4) removed the cross-reference to clause 57(1) of the Crimes Bill and drafted a provision which, according to them, would encapsulate the notion that presence at the scene of an offence would attract liability provided that such presence was intended to encourage and did in fact encourage. They claim, at p. 31 of their Report, that their use of the word "encourage" in clause 57(4)(a) captures both of these elements:

> **57.** ...
> (4) A person may be a party to an offence by being present at the scene of the offence if that person -
> (a) By his or her presence, intentionally encourages any other person to commit or continue the offence;

The Committee's redraft of paragraph (b) (see their Report at p. 31) incorporates two points from the Draft Code cl. 27(3): first, the scope of liability is limited to those who, rather than fail to exercise their authority, fail to take reasonable steps to do so; second, the paragraph includes a failure to discharge a duty as well as

4.6 As to the issue of divergent offences, the relevant portion of the Crimes Bill is clause 57, subclauses (3)-(4). While section 70[35] of the Crimes Act, which these clauses were intended to replace, allowed for liability only in the case of one who incited, counselled or procured the commission of the offence, clause 57(3), by providing for liability under clause 57(1)[36] even though the offence committed is committed in a different manner from that contemplated by the accessory, applies also to those who assist. Clause 57(4), relating to situations where the offence committed is in fact, different from that contemplated by the accessory, is however, limited to those who do or say anything to bring about the commission of the offence and as such, would appear to have a scope similar to that of the present rule[37] which is confined to instances of inciting, counselling or procuring.[38]

4.7 Clause 58 of the Bill restates section 66(2)[39] of the Crimes Act on common purpose, without major amendment. The main change is the substitution of the term "offence" for the phrase "unlawful purpose".

4.8 As to incitement[40] and facilitation, the current provision, section 311(2) of the Crimes Act, does not encompass an offence of inchoate aiding. Clause 67(1) of the Bill however, covers any "attempt to help or bring about" the commission of an offence. It provides that any person who would have been a party to an offence under clause 57(1) of the Bill, had the offence in question been committed, is subject to the same penalty as would apply had he been guilty of an attempt to commit that offence. As clause 57(1) comprehends helping as well as encouraging, it follows that an instance of assistance which is, in the event, not acted upon by the party assisted, would still provide a basis for the imposition of liability on the party responsible for the assistance.

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a failure to exercise authority:

> **57.** ...
> (4) ... if that person -
> (b) Intentionally fails to take reasonable steps to exercise any authority or to discharge any duty that he or she has in the circumstances to prevent the commission or continuance of the offence.

See also Dawkins, *op. cit.*, at pp. 124-126.

[35] See para. 3.2 above.

[36] See para. 4.4 above.

[37] Crimes Act 1961, s. 70(2).

[38] Dawkins, *op. cit.*, at p. 129, considers that each subclause ought to apply expressly to both forms of participation. He, *ibid.*, and the Crimes Consultative Committee (*op. cit.*, at p. 31) further recommend the substitution of the term "probable consequence" for "likely consequence" in clause 57(4), to achieve uniformity of language with clause 58 (see para. 4.7 below).

[39] See para. 2.3 above.

[40] See para. 3.1, n. 19 above.

APPENDIX

PART IV: THE UNITED STATES OF AMERICA

THE MODEL PENAL CODE

Introduction

1.1 The Model Penal Code (hereinafter "MPC"), although not of strict binding authority, has played an important part in the widespread revision and codification of the substantive criminal law of the United States.[1] On a judicial level, certain parts of the Code material have been used by the courts as an aid to the interpretation of the various codes and in restating and reshaping areas of the unwritten law.[2]

Parties to Offences

2.1 Section 2.06 is headed "Liability for Conduct of Another; Complicity." Subsection (1) reads as follows:

> A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

2.2 Subsection (2) lists the situations in which such legal accountability can arise:

> A person is legally accountable for the conduct of another person when:
>
> (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
>
> (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
>
> (c) he is an accomplice of such other person in the commission of the offense.

2.3 Subsection (2)(a) deals with the universally acknowledged principle that a party is no less guilty of the commission of a crime simply because he uses the overt conduct of an innocent or irresponsible agent.[3] In most of the United States jurisdictions, there was at the time of the drafting of the MPC no legislative formulation of the principle, which therefore

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[1] See Director of the American Law Institute, Herbert Wechsler's Foreword (May 30 1984) to the Model Penal Code and Commentaries (1985), Part I, vol 1, pp. xi-xiv, *passim*.

[2] *Ibid.*

[3] See Consultation Paper, paragraphs 1.15-1.18.

either obtained as common law[4] or ineptly as an aspect of "procuring" the commission of a crime.[5] None of the various formulations[6] was quite adequate; it is paradoxical to consider a situation of counselling etc, an innocent or irresponsible person to commit a crime, since, as a matter of logic, their conduct is not criminal; the United States Code provision[7] addressed this difficulty by referring to conduct that would be criminal "if directly performed" by the defendant "or another". Such a formulation is unsatisfactory on several grounds:[8] it is not limited to acts of an innocent or irresponsible agent, although this is the situation with which the *Historical and Revision Notes* suggest it is designed to deal. Furthermore, the requirement that the act be caused "willfully" may suggest that it must be caused purposely, although there are cases in which, according to the commentators on the MPC,[9] less than this should suffice to ground liability. When a crime may be committed with a mens rea of recklessness or negligence, it should suffice that one with such recklessness or negligence causes the required overt conduct by an innocent or irresponsible person:[10] there is no reason for demanding that such conduct be caused purposively.[11] The

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[4] In which case the party acting through the agent would be regarded as a principal.

[5] *Model Penal Code and Commentaries* (hereinafter *MPC Com*), Part I, vol 1 (Part I of the Code occupies two volumes which are not officially categorised as vols 1 and 2. For ease of reference however, that categorisation will be used. It should be noted that only the statutory text itself has the approval of the ALI; the original comments on Part I were drafted by Herbert Wechsler (see n. 1, above) in collaboration with a number of Special Consultants. Professor Peter W Low was responsible for the revised drafts and Professor R Kent Greenawalt performed the reportorial function for Articles 2 to 7 of the Code.), at p. 300. However, certain jurisdictions had adopted a legislative stance on the issue: in at least eight states liability was attached to persons "counseling, advising or encouraging children under the age of [*x*] years, lunatics or idiots, to commit any crime," (Ariz Rev Stat Ann § 13-139 (1956) (current version at Ariz §§ 13-301, -302, -304, -305); Cal § 31; Idaho § 18-204; Mont Rev Codes § 94-204 (1969) (current version at Mont § 94-2-107(1)); ND Rev Code § 12-02-04 (1943) (current version at ND § 12.1-03-01); Utah Code Ann § 76-1-44 (1953) (current version at Utah § 76-2-202); Colo Stat Ann ch 48, § 8 (1935) (current version at Colo § 18-1-602); Ga Code Ann § 26-305 (1936) (current version at Ga § 26-801)); the pre-revision Texas law dealt generally with "employing a child or other person who cannot be punished to commit an offense" and the use of other "indirect means" (Tex Penal Code Art 68 (Vernon 1952). The revised provision, Tex § 7.02(a)(1), is based on the Model Penal Code provision under discussion); two states disallowed a defence that the person abetted or procured "could not or did not entertain a criminal intent" (Nev § 195.020; Wash Rev Code § 9.01.030 (1951) (current version at Wash § 9A.08.020)); the United States Code, which deals with federal offences, reflects another different approach: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal" (18 USC § 2(b) (1976)).

[6] See n. 5 above.

[7] *Ibid.*

[8] *MPC Com*, Part I, vol 1, at pp. 301-302.

[9] At p. 302.

[10] Compare the treatment of this subject in the Draft Code, at cl. 26:

> (1) A person is guilty of an offence as a principal if, *with the fault required for the offence* [emphasis added] -
>
> (a) ...
>
> (b) ...

MPC provision, therefore, renders a defendant accountable for the behaviour of an innocent or irresponsible agent when he causes such behaviour to occur, provided he has caused it with the mental element, be it purpose, knowledge, recklessness or negligence that the law requires for the commission of the offence in question.[12]

2.4 Subsection (2)(b) allows for the definition of particular offences or other parts of the MPC to impose accountability for the conduct of another, according to criteria other than those set out in Section 2.06. An example of this, taken from the MPC itself, is Section 242.6(2), which ascribes liability to one who "knowingly causes or facilitates an escape". In this particular context, liability is extended beyond that imposed by Section 2.06, under which, to establish liability, facilitation must be purposive; knowledge alone does not suffice. Indeed, the requirement of purpose in Section 2.06(3) was formulated and approved with the understanding that a more stringent liability might be desirable in certain situations.[13]

2.5 Under Subsection (2)(c), one is legally accountable for the conduct of another when one is an "accomplice" of the latter. Subsection (3) lists the particular requirements of complicity:

> A person is an accomplice of another person in the commission of an offense if:
>
> (a) with the purpose of promoting or facilitating the commission of the offense, he
>
> (i) solicits such other person to commit it, or

(c) he procures, assists or encourages such act or acts done by another who is not himself guilty of the offence because -
(i) he is under ten years of age; or
(ii) he does the act or acts without the fault required for the offence; or
(iii) he has a defence.

Contrast our earlier conclusion in PWP No 43, Proposition 3 at p. 11:
(1) A person acts through an innocent agent when he intentionally causes the external elements of the offence to be committed by (or partly by) a person who is himself innocent of the offence charged by reason of lack of a required fault element, or lack of capacity.

[11] The commentators on the MPC, at Part I, vol 1, p. 302, cite the following examples to illustrate this point: "A reckless motorist who runs down a pedestrian is no less guilty of manslaughter because a carefully performed emergency operation is the immediate cause of death. One who recklessly leaves his car keys with an irresponsible agent known to have a penchant for mad driving should, by the same token, be accountable for a homicide due to such driving if the irresponsible agent uses the car in that way. So too an aggressor who provokes his victim to fire in reasonable self-defense ought to be guilty, at the least, of manslaughter if a bystander is hit, even though he does not mean to cause the shot in self-defense.".

[12] Thus, one who directed a child to kill would be guilty of intentional homicide if death results, because he meant the death to occur. However, if a defendant recklessly caused a child to kill intentionally, the child's intent would not be imputed to him; he might be guilty of manslaughter for his recklessness but he is accountable for nothing more: *MPC Com*, Part I, vol 1, at pp. 302-303.

[13] *MPC Com*, Part I, vol 1 at p. 304.

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or
(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

2.6 As to the mental element required for complicity, subsection 3(a) demands that the actor have as his purpose the promotion or facilitation of the commission of the offence:[14]

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[14] There was originally division within the ALI as to whether a purpose to promote or facilitate the offence ought to be required. The original draft of subsection (3) was not confined to cases where there was such a purpose, but also extended to those who, with knowledge that another was committing or had the purpose of committing an offence, knowingly facilitated its commission. To counterbalance this less stringent mens rea requirement, the physical elements of complicity were more rigorously drafted, such as to require, in alternative formulations, "substantial" facilitation by the actor or the provision by him of the means or opportunity for the commission of the crime, thereby rendering substantial facilitation. The original draft read as follows:

(3) A person is an accomplice of another person in commission of a crime if:

(a) with the purpose of promoting or facilitating the commission of the crime, he

(1) commanded, requested, encouraged or provoked such other person to commit it; or
(2) aided, agreed to aid or attempted to aid such other person in planning or committing it; or
(3) having a legal duty to prevent the crime, failed to make proper effort so to do; or

(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission; or

[Alternate: (b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly provided means or opportunity for the commission of the crime, substantially facilitating its commission; or]

(c) his behavior is expressly declared by law to establish his complicity.

MPC § 2.04(3) Tentative Draft 1 (1953), at pp. 11-12.

Only a few of the recently enacted and proposed state provisions follow the approach of the MPC Tentative Draft: the Michigan proposal, for example, provides:

A person is legally accountable for the behavior of another constituting a criminal offense under either of the following circumstances:

(a) With the intent to promote or facilitate the commission of the offense he does any of the following:

(i) Solicits such other person to commit the offense.
(ii) Aids or abets such other person in planning or committing the offense.
(iii) Having a legal duty to prevent the commission of the offense, fails to make an effort he is legally required to make.

his conscious objective must be the bringing about of the conduct declared to be criminal. Prior to its being addressed by the American Law Institute, the mens rea issue had received a deal of attention in the federal courts, where a division of opinion as to the requirements for liability emerged. The Second Circuit adopted a position in favour of Subsection (3) as it now reads, that traditional definitions of complicity "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colorless, 'abet' - carry an implication of purposive attitude towards it".[15] Strong disagreement has, however, been expressed, for example, in the Fourth Circuit by Judge Parker in *Backun* v. *US*:[16] at p. 637:

> Guilt as an accessory depends, not on "having a stake" in the outcome of crime ... but on aiding and assisting the perpetrators .... The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun ....

The ALI favoured a formulation akin to that in *Peoni*, principally on the basis that the need to state a general principle in this section pointed towards as narrow a provision as possible, in order not to include situations where liability was inappropriate.[17]

> (b) Acting with knowledge that such other person was committing or had the purpose of committing the offense, he knowingly provided means or opportunity for the commission of the offense that substantially facilitated its commission.

Mich (p) SB 82 § 415. See also Wash § 9A.08.020; US (p) (denotes proposal) S 1437 § 401(a)(1) (Jan 1978); Cal (p) SB 27 § 2302; DC (1978 p) § 22-110(a)(1).

[15] *US* v. *Peoni* (1938) 100 F 2d 401, at p. 402, *per* Judge Learned Hand. The same judge observed, in *US* v. *Falcone* (1940) 109 F 2d 579, at p. 581 (2d Cir), " ... [the accomplice] must in some way promote the[] venture himself, make it his own, have a stake in its outcome". The Supreme Court has cited the *Peoni* formulation with approval: *Nye and Nisson* v. *US* (1949) 336 US 613, at p. 619, and other circuits have been influenced by it: see eg, *Mack* v. *US* (1964) 326 F 2d 481 (8th Cir); *US* v. *Moses* (1955) 220 F 2d 166 (3rd Cir); *Morei* v. *US* (1942) 127 F 2d 827 (6th Cir).

[16] (1940) 112 F 2d 635.

[17] *MPC Com*, Part I, vol 1, at p. 318. The possibility that a broadened liability should obtain in particular circumstances is one that could be addressed in the context of the substantive offences in question: see eg, MPC Section 242.6(2): "Any person who knowingly causes or facilitates an escape commits an offense".

Some states have gone further than the ad hoc approach of the ALI, and have introduced offences of facilitation which extend liability to persons who engage in conduct with the awareness that it will aid another to commit a crime, but treat such facilitation as a less grave offence than the crime that is aided. New York provided:

> A person is guilty of criminal facilitation in the second degree when, believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to

2.7 While a defendant will not be liable on account of conduct which it was not his purpose to promote or facilitate, that is not to say that the precise means used in the commission of the crime must have been fixed or contemplated.[18] One who solicits[19] an end, or aids or agrees to aid in its achievement is an accomplice in whatever means may be employed, to the extent that the employment of those means constitutes an offence fairly within his conscious objectives.[20]

2.8 In defining the conduct required to found liability for complicity, subsection (3)(a) includes not only one who solicits[21] or aids, but also one who agrees or attempts to aid in the planning or commission of the offence. Also covered is one who, having a legal duty to prevent the commission of the crime, fails to make a proper effort to do so.[22] This is supposed to represent an exhaustive description of the ways in which one may purposively enhance the probability that another will commit a crime.[23]

2.9 Subsection (3)(b) preserves all special legislation declaring, independently of Subsection (3)(a), that particular behaviour suffices for complicity. Such legislation[24] is analogous to that mentioned in paragraph 2.4 above, which refers to certain acts of assistance that are, in fact, classified as complete, independent crimes.

2.10 Subsection (4) reads as follows:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he

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commit a felony.

NY § 115.00. See also Ariz § 13-604; Ky §§ 506.080 to .100; ND § 12.1-06-02, and Final Report of the National Commission on Reform of Federal Criminal Law § 1002 (1971); Mass (p) ch 263, § 46; W Va (p) §§ 61-4-8 to -4-10.

[18] *MPC Com*, Part I, vol 1, at pp. 310-311.

[19] See paragraph 4.1 below.

[20] *MPC Com*, Part I, vol 1, at p. 311.

[21] Solicitation is also defined in Section 5.02(1): see paragraph 4.1 below.

[22] Several states have similar provisions or proposals which expressly attach accomplice liability to omissions: Ala § 13A-2-23(3); Ark § 41-303(1)(c); Haw § 702-222(1)(c); Ky § 502.020(1)(c); NJ § 2C:2-6(c)(1)(c); ND § 12.1-03-01(1)(b); Ore § 161.155(2)(c); Tex § 7.02(a)(3); Alas (p) § 11.16.110(2)(c) (HB 661, Jan 1978); Mich (p) SB 82 § 415(a)(iii); Mass (p) ch 263, § 21(a)(2); Tenn (p) § 502(a)(3); W Va (p) § 61-2-13. Arizona has a provision (Ariz § 13-301(3)) that imposes liability one who "provides means or *opportunity* to another person to commit the offense" (emphasis added). Because a failure to act by one with a duty to act could provide an opportunity otherwise unavailable to another person, such an omission would seem to bring one within the scope of this statute.

[23] *MPC Com*, Part I, vol 1, at p. 314.

[24] See eg, Fla Stat Ann § 806.09 (1965) (current version at Fla § 806.10) (person wilfully destroying fire apparatus within 24 hours before fire "deemed guilty of the burning, as accessory before the fact").

acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Under this Subsection,[25] complicity in conduct causing a particular criminal result entails accountability for that result, provided that the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime. Thus, an accomplice who recklessly endangered the life of a person by rendering assistance to another could be convicted of manslaughter if death resulted.[26] The most common situation in which Subsection (4) will become relevant is where unexpected results occur from conduct for which the actor is responsible under Subsection (3). His liability for unexpected occurrences is based upon two factors: his complicity in the original conduct that causes the unexpected result, and his culpability towards the result to the degree required by law that makes the result criminal. Such a formulation combines the policy that accomplices are accountable within the range of their complicity with the policies underlying those crimes that are defined according to results.[27]

2.11 Subsection (5) reads:

> A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

The commentators on the MPC observed[28] that many crimes are designed to regulate the behaviour of persons who occupy special positions, and thus can only be committed by those persons. It is universally acknowledged,[29] however, that one who assists such a person in the commission of such an offence can nevertheless be held liable as an accomplice.[30]

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[25] Provisions based on subsection (4) have been included in Ariz § 13-303 (B); Ark § 41-303(2); Haw § 702-223; Ky § 502.020(2); NH § 626:8(IV); Pa tit 18, § 306(d); W Va (p) § 61-2-13(b).

[26] See MPC Section 210.3(1), which reads:

> (1) Criminal homicide constitutes manslaughter when:
>
> (a) it is committed recklessly; ...
> (b) ....

[27] *MPC Com*, Part I, vol 1, at p. 321.

[28] At Part I, vol 1, p. 323.

[29] *Ibid.*

[30] See eg, *Ruby* v. *US* (1932) 61 F 2d 617 (6th Cir), 288 US 617 (1933) (accessory to bankrupt); *Cody* v. *State* (1961) 361 P 2d 307 (Okla Crim App) (man accomplice to rape of his wife).

Common sense requires a result of this nature, and this is indeed provided for explicitly in most of the enacted and proposed revisions.[31]

2.12 There are, however, instances where the policy of the statute creating the offence in question dictates that certain parties ought to be exempt from accomplice liability for that offence. This possibility is accordingly made explicit in Subsection (6), which reads:

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is the victim of that offense; or
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> (b) the offense is so defined that his conduct is inevitably incident to its commission; or
>
> (c) he terminates his complicity prior to the commission of the offense and
>
> (i) wholly deprives it of effectiveness in the commission of the offense; or
> (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

The Subsection sets forth three exceptions to the general principles of complicity liability previously affirmed:

Victim:[32] The victim of a crime should not be held liable as an accomplice to that crime, even though his conduct may technically have assisted in its commission.[33] The commentary to the MPC cites[34] the example of the businessman who yields to the extortion of a racketeer and the parent who pay a ransom to the kidnappers of his or her child, both of whom may be unwise, and even regarded by some as immoral, but who ought not to be regarded as

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[31] Ala § 13A-2-25(2); Ariz § 13-304(2); Ark § 41-304(1); Colo § 18-1-605; Conn § 53a-9(3); Del tit 11, § 272(3); Haw § 702-225(1); Ky § 502.030(2); Me tit 17-A, § 57(4); Mo § 562.046(2); NH § 626:8(V); NJ § 2C:2-6(d); NY § 20.05(3); ND § 12.1-03-01(2)(a); Ore § 161.160(2); Pa tit 18, § 306(e); Tex § 7.03(1); Utah § 76-2-203(1); Wash § 9A.08.020(4); US (p) S 1437 § 404(c)(1) (1977); Alas (p) § 11.16.120(b)(2) (HB 661, Jan 1978); Md (p) § 20.05(3); Mass (p) ch 263, § 21(c)(1); Mich (p) SB 82 § 425(b); SC (p) § 11.1(c); Tenn (p) § 504(1); Vt (p) § 1.2.9(4); W Va (p) § 61-2-14(2).

[32] See Main Paper, paragraphs 2.83-2.88 above.

[33] *MPC Com*, Part I, vol 1, at p. 323.

[34] *Ibid.*, at pp. 323-324.

involved in the commission of the crime; to do so would confound the policy of the statute creating the offence in question.[35]

Conduct inevitably incident to the substantive offence: Exemption of the victim of a crime from accomplice liability does not wholly address the problems that arise.[36] The commentators on the MPC ask, as examples, the questions[37] whether a woman should be deemed an accomplice to a criminal abortion performed on her, whether the man who has intercourse with a prostitute ought to be liable as an accomplice to the act of prostitution, whether the purchaser is an accomplice to an unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe-giver an accomplice of the taker. Such situations mark the interface of conflicting policies as to whether the normal principles of accessory liability ought to apply; there is in these cases an ambivalence in public attitudes towards the behaviour in question that makes enforcement difficult at best; if liability is pursued to its fullest theoretical extent, public support might be wholly lost. On the other hand, a total reliance on prosecutorial discretion could lead to intolerable inconsistency.[38] To seek a systematic, general resolution to these issues is recognised by the commentators[39] as an insurmountable task; the problem of the appropriateness or otherwise of ascribing accomplice liability in these types of situation is best assessed in the context of each particular situation itself. Common to such types of case, however, is the fact that the question of accomplice liability must, by implication, be before the legislature at the stage of definition of the offence; the drafting of a provision regulating, say, sales, presupposes an awareness, on the part of the legislature, that two parties are involved in the behaviour under consideration. The purpose of a "inevitably incidental conduct" provision, according to the commentators, is to enable the legislators to focus on the issue of accomplice liability in the context of the crime in question; if they are aware that the buyer in an illegal sale will not be classed as an accomplice unless statute expressly so declares, clear definitions of offences based on the sale become more easily set out, and, therefore, subsequent cases involving those offences become more easily resolved.[40]

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[35] Many states have comparable enactments or proposals: Ala § 13A-2-24(1); Ark § 41-305(1)(a); Del tit 11, § 273(1); Haw § 702-224(1); Ill ch 38, § 5-2(c)(1); Me tit 17-A, § 57(5)(A); Mo § 562.041(2)(1); Mont § 94-2-107(3)(a); NH § 626:8(VI)(a); NJ § 2C:2-6(e)(1); ND § 12.1-03-01(1); Ore § 161.165(1); Pa tit 18, § 306(f)(1); Wash § 9A.08.020(5)(a); Alas (p) § 11.16.120(a)(1) (HB 661, Jan 1978); Mass (p) ch 263, § 21(b)(1); Mich (p) SB 82 § 420(a); Tenn (p) § 505(a)(1); Vt (p) § 1.2.9(5)(A); W Va (p) § 61-2-15(1).

[36] See Main Paper, paragraphs 2.83-2.88 above.

[37] At Part I, vol 1, p. 324.

[38] *Ibid.*, at p. 325.

[39] *Ibid.*

[40] *Ibid.* The commentators observe, *ibid.*, that an "inevitably incidental conduct" provision, such as subsection (6)(b) might be unacceptable in legislating for accomplices in an established system, where the legislature may or may not have dealt with the issue in particular definitions and will not have been consistent in its practice, but that in a model code, or a general revision, where former legislative practice appears immaterial, the problem may be faced as each branch of the work proceeds. Provisions similar to Subsection (6)(b) are to be found in many recent revisions: Ala § 13A-2-24(2); Ark § 41-305(1)(b); Del tit 11, § 273(2); Haw § 702-224(2); Ill ch 38, § 5-2(c)(2); Ky § 502.040(1); Me tit 17-A, § 57(5)(B); Mo § 562.041(2); NJ §

Termination:[41] The commentators note[42] that, although action that suffices for complicity may have occurred, the law does and should provide for the avoidance of accomplice liability if the reason for its imposition has disappeared before the crime is committed.[43] The general principle is that the accomplice must deprive his prior action of its effectiveness, and therefore, the behaviour necessary to amount to termination will vary according to the preceding accessorial involvement. If the involvement consisted of aid, say, in the form of provision of arms, a statement of withdrawal ought not to suffice; a recovery of the arms, such as to render ineffective his previous aid.[44] In the case of accessorial involvement by way of a request or encouragement, a communicated countermand might be enough, provided it was communicated in time to allow reconsideration by those planning to commit the crime.[45] There are situations in which the only possible way in which an accomplice can deprive his conduct of effectiveness is by timely contact with the law enforcement agencies. In such circumstances, or where there is otherwise proper effort to prevent the commission of the crime, the accomplice should be allowed a defence.[46] The commentators were mindful of the fact that the sort of effort that should be demanded was closely linked to the circumstances;[47] Subsection (6)(c)(ii) accordingly contains the requirement of "proper effort"[48] to prevent the commission of the offence.[49]

2.13 Subsection (7) deprives the distinction between principals and accessories of any procedural significance:[50] the conviction of the accomplice, under the provision, is not

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2C:2-6(e)(2); Alas (p) § 11.16.120(a)(2) (HB 661, Jan 1978); Md (p) § 20.10; Mich (p) SB 82 § 420(b); SC (p) § 11.2; Tenn (p) § 505(a)(2); Vt (p) § 1.2.9(5)(B); W Va (p) § 61-2-15(2).

[41] See Main Paper, paragraphs 2.95-2.101 above.

[42] At Part I, vol 1, p. 326.

[43] The phraseology employed by the commentators suggests that the reason for the imposition of accomplice liability is purely the future action of the principal offender. We have sought to base the liability of the assister or encourager on *his own* actions: see eg, Main Paper, paragraphs 4.38-4.39.

[44] Part I, vol 1, p. 326.

[45] *Ibid.*

[46] *MPC Com*, Part I, vol 1, at p. 326.

[47] *Ibid.*

[48] Whether a proper effort has been made is presumably a question of fact.

[49] Termination defences have been provided by most, though not all, of the recently revised and proposed state codes: Ala § 13A-2-24(3); Ark § 41-305(2); Conn § 53a-10(a); Del tit 11, § 273; Fla § 777.04(5); Haw § 702-224(3); Ill ch 38, § 5-2(c)(3); Ky § 502.040(2); Me tit 17-A, § 57(5)(C); Minn § 609.05(3); Mo § 562.041(2)(3); Mont § 94-2-107(3)(b); NH § 626:8(VI)(c); NJ § 2C:2-6(e)(3); Ohio § 2923.03(E); Pa tit 18, § 306(f)(3); Wash § 9A.08.020(5)(b); Alas (p) § 11.16.120(a)(3) (HB 661, Jan 1978); Md (p) § 20.20; Mass (p) ch 263, § 21(b)(2); Mich (p) SB 82 § 420(c); SC (p) § 11.2; Tenn (p) § 505(b); Vt (p) § 1.2.9(b); W Va (p) § 61-2-15(3).

[50] Cf, Main Paper paragraphs 2.8-2.9 above.

contingent upon the prosecution and conviction of the principal for that offence; the Subsection does not, of course, dispense with the need to prove the actual commission of the principal offence. It reads:

> An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Inchoate Aiding

3.1 The complicity provisions in Section 2.06 of the MPC presuppose the commission of the principal offence.[51] However, a crime of inchoate aiding[52] is effectively provided for by Section 5.01(3), which reads:

> *Conduct Designed to Aid Another in Commission of a Crime*
> A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

The rationale for inclusion in the scheme of criminal liability of the actor who attempts to aid is simply that he manifests the same degree of dangerousness of character as the party who attempts to commit an offence himself.[53] Many recently enacted codes and proposed revisions contain a similar provision.[54]

Criminal Solicitation

4.1 The MPC deals with criminal solicitation at Section 5.02. The offence is defined at Subsection (1):

> *Definition of Solicitation*
> A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit

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[51] MPC, Section 2.06(1); 2.06(2)(c). See paras. 2.1 and 2.5, above. The Section does not, however, presuppose that the assistance putatively rendered by the accomplice actually reached and affected the principal offender: provided that the principal offence is actually committed, it is enough that the accomplice "attempt[ed] to aid" its commission: MPC, Section 2.06(3)(a)(ii): see paras. 2.5ff, above.

[52] See Main Paper, paragraphs 4.20ff, above.

[53] *MPC Com*, Part I, vol 2, at p. 356. See Main Paper, paragraphs 4.18ff.

[54] See Ariz § 13-1001(A)(3); Ark § 41-702; Colo § 18-2-101(2); Del tit 11, § 533; Haw § 705-501; Ky § 506.010(3); Me tit 17-A, § 152(3); NJ § 2C:5-1(c); ND § 12.1-06-01(2); National Commission on Reform of Federal Criminal Law, Final Report § 1001(2); Mass (p) ch 263, § 45(b); Mich (p) SB 82 § 1005; Vt (p) § 2.4.2(3); W Va (p) § 61-4-1(c).

such crime or would establish his complicity in its commission or attempted commission.[55]

As with the offence of incitement in English law,[56] there is no requirement that the solicitation result in action on the part of the person solicited. Section 5.05(2) permits reduction of the offence or even dismissal if a solicitation is "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting" the ordinary grading of the solicitation as an offence.

4.2 As to the mens rea for solicitation, the actor must have "the purpose of promoting or facilitating" the crime solicited; it is not enough that a person is aware that his words[57] may lead to a criminal act, or even that he is quite sure that they will do so.[58]

4.3 Subsection (1) demands that "specific conduct"[59] that would constitute the crime in

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[55] Most recently revised codes and proposals have followed the MPC and contain a generalised prohibition of solicitation: see Ala § 13A-4-1; Ariz § 13-1002; Ark § 41-705(1) (limited to felonies); Colo § 18-2-301(1) (felonies only); Del tit 11, §§ 501-503; Fla § 777.04(2); Ga § 26-1007 (Cum Supp 1976) (felonies only); Haw § 705-510(1); Ill ch 38, § 8-1(a); Iowa § 705.1 (felonies or aggravated misdemeanours only); Ky § 506.030(1); La § 14:28 (felonies only); Me tit 17-A, § 153(1) (murder or class A or class B felonies only (punishable by imprisonment in excess of 5 years)); Mont § 94-4-101(1); NH § 629:2(I); NY §§ 100.00-.10 (Cum Supp 1978-79); ND § 12.1-06-03(1) (felonies only); Ore § 161.435(1) (felonies or class A misdemeanours only); Pa tit 18, § 902(a); Tex § 15.03(a) (capital or first degree felonies only); Va § 18.2-29 (felonies only); Wash § 9A.28.030(1); Wis § 939.30 (felonies only); US (p) S 1437 § 1003(a) (Jan 1978); National Commission on Reform of Federal Criminal Law, Final Report § 1003(1) (felonies only); Alas (p) § 11.31.110 (HB 661, Jan 1978); Cal (p) SB 27 § 6002(a) (a list of 12 felonies only); DC (1978 p) § 22-202 (class A or class B felonies only); Md (p) § 100.00; Mass (p) ch 263, § 47(a) (felonies only); Mich (p) SB 82 § 1010(1); SC (p) § 14.3; Tenn (p) § 903(a) (felonies only); Vt (p) § 2.4.3; W Va (p) § 61-4-3(a).

[56] See Main Paper, paragraphs 2.126ff.

[57] Although *MPC Com*, at Part I, vol 2, p. 371, refers to "words", the use of the term "encourages" in Section 5.02 clearly indicates that one at least ought to be able to solicit by actions.

[58] *Ibid.*

[59] The Subsection (1) formulation as regards specificity is followed in several provisions: see Ariz §13-1002(A); Ark § 41-705(1); Fla § 777.04(2); Haw § 705-510(1); Ky § 506.030(1); Ore § 161.435(1); Pa tit 18, § 902(a); Tex § 15.03(a); Wash § 9A.28.030(1); Alas (p) § 11.31.110 (HB 661, Jan 1978); Md (p) § 100.00; Mich (p) SB 82 § 1010(1); SC (p) § 14.3; Tenn (p) § 903(a); W Va (p) § 61-4-3(a).

Many codes and proposals express the need for specificity of conduct by requiring the solicitation of conduct constituting a "particular felony" or a "particular crime". See Iowa § 705.1; Me tit 17-A, § 153(1); ND § 12.1-06-03(1); National Commission on Reform of Federal Criminal Law, Final Report § 1003(1); Cal (p) SB 27 § 6002(a). There is no apparent difference between this language and, for example, the language of the Hawaii statute, cited above, which requires the solicitation of "conduct ... specified by the definition of an offense."

Some formulations require the solicitation of "conduct constituting" a crime. These might be interpreted to include vague incitements to criminal action but they probably will be construed to require as great a degree of specificity of the conduct solicited as does the MPC and the other provisions cited in this note. See Ala 13A-4-1(a); Colo § 18-2-301(1); Del tit 11, §§ 501-503; Ga § 26-1007 (Cum Supp 1978-79); Ill ch 38, § 8-1(a); Mont § 94-4-101(1); NH § 629:2(I); NY §§ 100.00-.10 (Cum Supp 1978-79); Wis § 939.30; US (p) S 1437 § 1003(a)

question be solicited.[60] It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime is to be committed. However, in the context of the knowledge and position of the intended recipient, the solicitation must carry meaning in terms of some concrete course of conduct that it is the solicitor's object to incite.[61]

4.4 In the usual case, criminal solicitation involves the solicitation of another to engage in conduct that would constitute the crime contemplated.[62] The commentators on the MPC also considered[63] situations where, although the conduct solicited would not constitute a complete crime, the solicitation ought still to be criminal. First, where the conduct solicited constitutes an attempt. Such a charge will not arise a great deal in practice, as a rational solicitation seeks to promote the complete offence, rather than an unsuccessful attempt. In certain circumstances, however, the actor may solicit conduct that he and the party solicited[64] believe would constitute the completed crime, had the commission of that completed crime not been rendered, by circumstances unknown to them, impossible.[65] Second, where the conduct solicited amounts to complicity.[66]7 In such a case, liability would be imposed under Subsection (1), as the person solicited is being asked to take steps that would make him a party to the completed crime, were it committed.

4.5 Specific reference is made, in Subsection (2), to instances of behaviour designed to effect communication of a message that would amount to criminal solicitation, but which, in the event, remains uncommunicated. The Subsection reads as follows:

(Jan 1978); DC (1978 p) § 22-202(a); Vt (p) § 2.4.3.

[60] Constitutional problems are raised in the US by such a provision. These need not be analysed in detail in this Consultation Paper, but revolve around the protection afforded to freedom of speech and the press by the First Amendment to the Constitution, and therefore, the extent to which agitation remains legitimate.

[61] *MPC Com*, Part I, vol 2, at p. 377. In *Yates* v. *US* (1957) 354 US 298, a decision pre-dating the MPC, the Supreme Court held that to make out a violation of a particular statute, there had to be advocacy of *action* to overthrow the government, rather than advocacy merely of some abstract doctrine of violent overthrow: "The essential distinction is that those to whom advocacy is addressed must be urged to do something, now or in the future, rather than merely to *believe* in something.": *ibid.*, at pp. 324-325. The court also spoke, at one point, of "concrete action": *ibid.*, at p. 321.

[62] Section 5.04 deals with problems that arise because of the incapacity, irresponsibility or immunity of the party solicited: see para. 4.7 below.

[63] At Part I, vol 2, p. 373.

[64] Solicitation of an attempt could also occur in a situation where the solicitor, knowing of the circumstances that render commission of the crime impossible, encourages another party, who does not know of those circumstances, to commit the acts which, if the mentioned circumstances did not exist would amount to a completed crime (eg, X solicits Y to administer to Z a substance, known by X to be harmless but believed by Y to be deadly poison: X would be guilty of the solicitation of attempted murder): see Code Report, paragraph 13.16.

[65] For example, A solicits B to pick C's pocket, which happens to be empty.

[66] As to conduct sufficient to found a charge of complicity, see paras. 2.5ff, above.

Uncommunicated Solicitation
It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.[67]

Under the law existing prior to the drafting of this provision liability could attach even where the communication failed to reach the party intended to be solicited, although in such an instance the solicitor would have had to be prosecuted for an attempt to solicit.[68] Under Subsection (2), conduct "designed to effect" communication of the message generating culpability is sufficient, of itself, to constitute criminal solicitation and there is therefore no need for an offence of attempted solicitation.[69]

4.6 Subsection (3) provides:

Renunciation of Criminal Purpose
It is an affirmative defense[70] that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

The renunciation must be both complete and voluntary. In order to be complete, it must not be motivated simply by a decision to postpone the criminal activity solicited until a later time;[71] voluntariness is manifested by a change in the actor's purpose which is not brought

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[67] Only one of the recently revised codes and two of the proposals have similarly explicit treatment of uncommunicated solicitation: see Haw § 705-510(2); Md (p) § 100.15; SC (p) § 14.3.

[68] See eg, *People* v. *Bloom* (1912) 149 App Div 295, 133 NYS 708.

[69] *MPC Com*, Part I, vol 2, at p. 381.

[70] See MPC Section 1.12, the relevant parts of which read:

(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

(2) Subsection (1) of this Section does not:

(a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense ...

Ie, the prosecution is not required to disprove renunciation unless there is evidence in its support. However, if such evidence exists, the defense must be disproved beyond reasonable doubt: see eg, *MPC Com*, Part I, vol 2, at pp. 360-361.

[71] *MPC Com*, Part I, vol 2, at p. 358.

about or influenced by outside circumstances.[72] Many recently revised codes and proposals address the problem of renunciation and deal with it in a broadly similar manner.[73]

4.7 Section 5.04 is designed to deal with situations of incapacity, irresponsibility and immunity on the part of the party solicited. It reads as follows:

> (1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:
>
> > (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or
> >
> > (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.
>
> (2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under Section 2.06(5) or 2.06(6)(a) or (6)(b).

4.8 Subsection (1)(a) accords with the general principle that a person who is incapable of committing a particular substantive crime because he lacks a particular characteristic or position required by the definition of the crime in question may nevertheless be guilty of conspiracy[74] to commit that crime.

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[72] *Ibid.* Thus, an "involuntary" renunciation occurs when the actor ceases his endeavour because he fears detection or apprehension, or because he decides to wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime: *ibid.*, at p. 356. A "voluntary" renunciation involves a change in the actor's purpose that is not influenced by outside circumstances. Such may be termed repentance or change of heart. Lack of resolution or timidity may suffice. A reappraisal of the criminal sanctions applicable to his conduct would presumably be a motivation of the voluntary type, as long as it is not related to a particular threat of apprehension or detection: *ibid.*, at pp. 356-357.

[73] There is disagreement among the various provisions as to the placement of the burden of proof with respect to the defence. The following provisions accord with the MPC approach of an evidential burden on the defence, the burden of proof remaining with the prosecution: Ala § 13A-4-1(b); Colo § 18-2-301(4); Mich (p) SB 82 § 1010(2); W Va (p) § 61-4-6. The following provisions place the burden of persuasion on the defendant on the preponderance of the evidence: Ark § 41-706; Del tit 11, § 541; Haw § 705-530; Me tit 17-A, § 154(2); NH § 629:2(II); NY § 40.10(4); ND § 12.1-06-05(3)(b); Ore § 161.440; Tex § 15.04(b); US (p) S 1437 § 1003(b) (Jan 1978); National Commission on Reform of Federal Criminal Law, Final Report § 1005(3)(b); Alas (p) § 11.31.110(b) (HB 661, Jan 1978); DC (1978 p) § 22-202(b); Md (p) § 100.10; Mass (p) ch 263, § 49(b)(3); Tenn (p) § 904(b); Vt (p) § 2.4.4(2)(C). The following provisions all deal with the issue of renunciation of criminal purpose in the context of solicitation, but the position as regards burden of proof is unclear from the commentary to the MPC: Ariz § 13-1005(B); Fla § 777.04(5)(b); Iowa § 705.2; Ky § 506.060; Pa tit 18, § 902(b); SC (p) § 14.4.

[74] As the commentators observe, at Part I, vol 2, p. 476, the issue has been litigated more often in the context of conspiracy, although the principles are the same as regards solicitation. They are consequently considered together in the MPC. The decisions give various illustrative examples: the giver of a bribe to a public officer was guilty of conspiracy with the officer to *receive* the bribe; of course, only the officer himself

4.9 In an instance of solicitation, Subsection 1(a) would operate first, in the situation where D, the solicitor is personally incapable of committing the crime in question, but solicits its commission by X who is capable.[75] Secondly, the Subsection provides for liability in a case where both D and X are in fact incapable of committing the crime, but D *believes* that one of them is so capable.[76] This principle is well illustrated by *Commonwealth* v. *Jacobs*.[77] The defendant in that case was charged with violating a statute which made it a crime to "entice or solicit any person to leave the Commonwealth for the purpose of entering upon or enlisting ... in any military service elsewhere." It transpired that the party solicited had in fact been rejected as unsuitable for military service, both in Massachusetts, prior to the act of solicitation in question, and afterwards in New Hampshire. Pointing out that there was no evidence indicating that the unsuitability of the party solicited was manifest, the court held that that factor was immaterial to the issue of the defendant's guilt:

> Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance.[78]

The moral culpability of the defendant is not altered by the existence of a state of affairs of which he knew nothing. It stands to reason that his legal accountability ought similarly to be unaffected.

4.10 Subsection (1)(b) shows that any immunity of a personal nature that the party solicited may be able to rely on may not be similarly relied on, and has no bearing on the culpability of, the solicitor.[79]

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could have been guilty of the actual receiving: *Downs* v. *US* (1925) 3 F 2d 855 (3d Cir), 268 US 689; an unmarried man could be convicted of conspiracy with a married man that the latter commit adultery: *State* v. *Martin* (1924) 199 Iowa 643, 200 NW 213.

[75] See the examples in n. 74, above.

[76] See *MPC Com*, Part I, vol 2, at p. 478.

[77] (1864) 91 Mass 274.

[78] At p. 275.

[79] See *MPC Com*, Part I, vol 2, at pp. 479-480. Seven state codes utilise language similar to that in Subsection (1)(b): Ariz § 13-1006(A)(2); Ark § 41-713(2)(b) (adds "or has feigned agreement"); Colo § 18-2-205(1)(b) (refers to conspiracy only); Haw §§ 705-511(2)(b), -523(2)(b); NJ § 2C:5-3(a)(2) (conspiracy only); Ore § 161.475(1)(b) (adds "or, in the case of conspiracy, has feigned the agreement"); Pa tit 18, § 904(a)(2). Many other provisions use a variety of linguistic formulations to achieve the same result. These may be roughly divided into five categories:

(1) Illinois precludes as a defence to a charge of conspiracy a list of five possibilities, including the possibility that the defendant's co-conspirator "lacked the capacity to commit an offense.": Ill ch 38, § 8-2(b). Substantially similar language, generally limited to charges of conspiracy may be found in six codes and four proposals: Ind

4.11 Subsection (2) reflects the same policies that are embodied in the complicity provisions of the MPC, at Sections 2.06(5) and 2.06(6)(a) and (6)(b).[80] It has been explained above[81] that to hold the victim of a crime guilty of that crime as an accomplice would confound legislative purpose. Similarly, were a victim found to have solicited or conspired in the offence committed against him, his prosecution would run counter to that purpose. As regards crimes to which the behaviour of more than one person is "inevitably incident", such as unlawful intercourse, bribery and unlawful sales, it has been observed[82] that various and conflicting policies are operative, for example a public ambivalence to the crime in question and the requirement of corroboration of accomplice testimony. In the complicity provision,

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§ 35-41-5-2(c); Me tit 17-A, § 151(7); Mont § 94-4-102(2); ND § 12.1-06-04(4); Tex §§ 15.02(c), .03(c) (also applicable to solicitation); Wash § 9A.28.040(2); US (p) S 1437 § 1002(d) (Jan 1978); National Commission on Reform of Federal Criminal Law, Final Report § 1004(4); Mass (p) ch 263, § 48(e); Tenn (p) §§ 902(c), 903(c) (also applicable to solicitation); Vt (p) § 2.4.1(9).

(2) NY § 105.30 provides:

> It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime.

The New York code also contains, at § 100.15, a substantially similar provision applicable to solicitation. Similar approaches may be found in three other codes and in four proposals: Ala § 13A-4-1(d) (solicitation only); Del tit 11, § 523; Ky § 506.070(1) & (2); Alas (p) § 11.31.130(a) (HB 661, Jan 1978); DC (1978 p) § 22-202(b) (solicitation only); Md (p) § 100.15 (solicitation only); Mich (p) SB 82 §§ 1010(4), 1015(4). In addition to language akin to that in Subsection (1)(b) of MPC Section 5.04, the Arizona and Hawaii statutes also contain language similar to the New York provision: Ariz § 13-1006(A)(3); Haw 705-511(2)(c) & (d), -523(2)(c) & (d).

(3) Three proposals combine the Illinois and New York approaches: US (p) S 1437 § 1003(c) (Jan 1978) (solicitation only); Md (p) § 105.20 (conspiracy only); W Va (p) § 61-4-7. In addition to language similar to that of MPC Section 5.04(1)(b), the Arkansas provision contains language that combines the Illinois and New York approaches: Ark § 41-713(2)(c) & (d).

(4) Under the provisions of four codes and four proposals, it is no defence to a charge of solicitation that the person solicited could not be guilty of the crime on such grounds as lack of responsibility or culpability, incapacity, or the presence of other defences: Colo § 18-2-301(3) (Cum Supp 1976); Me tit 17-A, § 153(3); NH §§ 629:2(III), :3(II) (also applicable to conspiracy); ND § 12.1-06-03(3); National Commission on Reform of Federal Criminal Law, Final Report § 1003(3); Mass (p) ch 263, § 47(c); SC (p) § 14.3; Vt (p) § 2.4.3(3). This appears to be a briefer version of the New York language quoted above. In their conspiracy provisions the Alabama statute and the South Carolina proposal add substantially similar language to a list like that found in Illinois: Ala § 13A-4-3(d)(1) & (2); SC (p) § 14.5.

(5) Georgia provides simply that it is not a defence to a charge of criminal solicitation "that the person could not be guilty of the crime solicited.": Ga § 26-1008 (Cum Supp 1980).

[80] See paras. 2.11-2.12 above.

[81] *Ibid.*

[82] *Ibid.*

the position adopted has been to leave to the selective judgement of the legislature the question of whether more than one participant ought to be subject to criminal liability. Subsection (2) restates this principle in relation to instances of solicitation and conspiracy. Since the exception is confined to behaviour "inevitably incidental" to the commission of the crime, the issue inescapably presents itself at the stage of defining the crime. Many recent revisions have a similar provision.[83]

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[83] See Ala § 13A-4-3(e) (conspiracy only); Ill ch 38, § 8-3 ("It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense."); Me tit 17-A, §§ 151(8), 153(2); NJ § 2C:5-3(b) (conspiracy only); Ore § 161.475(2); Pa tit 18, § 904(b); Mass (p) ch 263, §§ 47(b),48(d); Mich (p) SB 82§ 1015(3) (conspiracy only); Vt (p) §§ 2.4.1(8), .4.3(2). Colo § 18-2-301(2), ND § 12.1-06-03(2) and National Commission on Reform of Federal Criminal Law, Final Report § 1003(2) achieve essentially the same result, with respect to solicitation only, by incorporating the language of Subsections (6)(a) and (6)(b) of MPC Section 2.06 into the solicitation defense; Colo, above, requires that "the defendant be the sole victim of the offense." Hawaii achieves essentially the same result as the MPC, but omits reference to the actor's guilt under the law defining the offense: Haw §§ 705-523(1), -511(1). The Arkansas statute is the same as Hawaii's, but omits the phrase "unless otherwise provided by the law defining the offense.": Ark § 41-713(1), (2)(e). The Alaska, Tennessee (conspiracy), and Michigan (solicitation) proposals are also the same as Hawaii's, except that they make no reference to provisions analogous to MPC Section 2.06(5) (see para. 000 above): Alas (p) § 11.31.130(b) (HB 661, Jan 1978); Mich (p) SB 82 § 1010(3); Tenn (p) § 902(d).

The solicitation proposal in Maryland provides:

Unless otherwise provided by the code or by the law defining the offense, a person is not guilty of solicitation if the offense is so defined that his conduct is inevitably incident to its commission.

Md (p) § 100.20. Similar provisions are to be found in New York and Alabama: Ala § 13A-4-1(c); NY § 100.20.

A similar provision, relating to conspiracy, is to be found in the statutes of Delaware and Kentucky and in the proposal in West Virginia:

No person may be convicted of conspiracy to commit an offense when an element of the offense is agreement with the person with whom he is alleged to have conspired, or when the person with whom he is alleged to have conspired is necessarily involved with him in the commission of the offense.

Del tit 11, § 521(c); Ky § 506.050(4); W Va (p) § 61-4-5(d).